Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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79 pp

QUESTIONS PRESENTED FOR REVIEW

The State of Florida seeks relief from an administrative order requiring the state to repay $961,003 in funds received by the State to implement training services under the Job Training Partnership Act of 1982, 29 U.S.C. § § 1501 *et seq.* ("JTPA"). The Secretary of the United States Department of Labor ("USDOL") found that "profits" earned on contracts for training services were unreasonable and unnecessary. Based on four contracts produced during the proceeding, the Secretary also ruled that the USDOL met its burden of production for the purpose of establishing that 250 contracts did not meet the requirements for fixed unit contracting in accordance with 20 C.F.R. § 629.38 (e)(2). The Court of Appeals affirmed.

The Questions Presented are:

I. Whether the decision rendered by the Secretary as affirmed by the Eleventh Circuit ignored express congressional intent to decentralize the authority from the federal government to the several states and local entities under the Job Training Partnership Act of 1982?

II. Whether the decision of the Eleventh Circuit Court of Appeals is in direct conflict with a Supreme Court decision and with decisions rendered by other circuit courts of appeals?

III. Whether the Eleventh Circuit has sanctioned a blatant departure from law established by the Supreme Court and law established in its own circuit to the extent that this Court should exercise its supervisory powers?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the captioned of the case. There is no parent of subsidiary company of any party to be listed.

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OPINIONS BELOW

The decisions of the United States Court of Appeals for the Eleventh Circuit is set forth in Appendix B. It has not been published.

The order of the United States Court of Appeals for the Eleventh Circuit denying the Petitioner for Rehearing and Suggestion of Rehearing En Banc is set forth in Appendix A.

The decision of the Administrative Law Judge of the United States Department of Labor is set forth in Appendix C ("App."). It has not been published.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered April 9, 1996. The order denying the Petition for Rehearing and Suggestion of Rehearing En Banc was entered July 1, 1996. Jurisdiction of this Court is invoked under 28 U.S.C. § 1578(b) and 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 28 U.S.C. § § 1501 *et seq.*, pertinent parts are set forth in Appendix D.

STATEMENT OF THE CASE

The Florida Department of Labor and Employment Security, hereinafter "Florida," requested an administrative hearing on the Final Determination issued by the Grant Officer, pursuant to § 166 of the Job Training Partnership Act, 1982 (JTPA), 29 U.S.C. § 1501 *et seq.*, the Wagner Peyser Act (WPA), as amended by the JTPA, and its regulations at 20 C.F.R. § 629.57, *et seq.*

The Final Determination found that Florida had accumulated profits of $961,003 as a result of its administration of the Job Training Partnership Act (JTPA) over a (7) seven year period, and specifically from approximately 250 fixed unit priced performance based contracts executed between Florida, its Service Delivery Areas and various Employment Security Job Service Offices.

Prior to the hearing which was conducted by an Administrative Law Judge (ALJ), Florida took depositions, conducted discovery and filed a Motion For Summary Judgment and a Motion to Dismiss contending that there were no disputed issues of fact, as USDOL had not set forth any factual basis upon which to establish deficiencies in 250 contracts. Both motions were argued on July 19, 1993, prior to the hearing.

On July 6, 1993, (13) thirteen days before the hearing and after the parties had submitted pre-hearing statements, the ALJ ordered Florida to produce at the final hearing, one contract for each program year in question, in spite of oral and written objections from Florida. At the hearing, the state produced four contracts, one for each contract year 1983 through 1989, and USDOL produced one contract. Contracts for 1983 through 1985, had been destroyed prior to the audit in question, consistent with 20 C.F.R. § 629.35(e) which required grant recipients to retain records for a three year period. On August 19, 1993, the Grant Officer filed a post-hearing motion for order finding that the contracts not produced by Florida would have been adverse to Florida. The ALJ denied the motion by order dated December 2, 1993, and further found that to grant such relief would dispose of a large portion of the case on a technicality.

On May 2, 1994, the ALJ issued his final decision and

Order which granted Florida's motion for summary judgment in part and is located at App.C). He further found that by merely producing one contract during the hearing the Grant Officer failed to meet his initial burden of production to substantiate that 250 contracts violated the provisions of 20 C.F.R. § 629.38(e)(2) (App. D, p. 33a) or § 629.37(a) (App. D, p. 31a). The ALJ found no specific violation of the JTPA or the regulations and accordingly reversed the Grant Officer's disallowance of $961.003.

On May 23, 1994, the Grant Officer filed exceptions to the ALJ's decision with the Secretary, who accepted the case for review on June 8, 1994. By Final Order and Decision dated December 5, 1994, the Secretary reversed the ALJ and ruled that the Grant Officer had met his burden of production and had properly disallowed $961,003. On December 29, 1994, Florida filed a timely appeal to the Eleventh Circuit Court of Appeals.

Briefs were submitted by Florida and by USDOL according to the briefing scheduled approved by the court. By Order dated April 9, 1996, the United States Court of Appeals for the Eleventh Circuit issued its order which affirmed the order issued by the Secretary reversing the findings of the ALJ (App. C). Agreeing with the Secretary, the court ruled that the record contained substantial evidence to support the Secretary's findings that the profits earned on contracts reflected costs which were not necessary or reasonable for the efficient administration of the JTPA program as required by 20 C.F.R. § 629.37(a) (App. D, p. 31a). As the profits were lawfully earned by various service providers who were awarded contracts through state approved competitive procurement procedures, the ruling ignores the expressed congressional intent underlying the JTPA. That intent was to defer to the autonomy of the states; thereby, reinforcing the systems of the dual sovereignty between the states and the federal

government, as established by the Constitution. 1982 U.S.C.C.A.N. 2636. (App. D, p. 50a). Florida filed a timely Motion for Rehearing En Banc, which was denied by the Court of Appeals on July 1, 1996.

It is from the decision issued by the Eleventh Circuit Court of Appeals affirming the Secretary's reversal of the findings of the ALJ and requiring Florida to repay $961,003 to USDOL that Florida is now respectfully submitting its Petition for Writ of Certiorari to this Court.

REASONS FOR GRANTING THE WRIT

This case has important implications regarding the allocation of powers between the federal government and the several states, as envisioned by Congress in enacting the Job Training Partnership Act of 1982. The legislation was designed to end federal involvement in the details of training program operations. 1982 U.S.C.C.A.N. 2636-2637 (App. D, p. 51a).

Despite the clearly stated legislative intent, the Secretary, and the Eleventh Circuit by its affirmation of the Secretary's decision, have retreated from the distribution of authority as intended under the JTPA.

In finding that contracts procured pursuant to state requirements violate the spirit of federal law, the Secretary and the Eleventh Circuit have ignored the autonomy of the states, as envisioned by Congress. The contracts in question were competitively procured under the oversight of the state. (*See* ALJ Order, App. C, p. 25a).

The Governor's function under the JTPA is more than merely funneling federal money to local job training programs;

rather the Act recognizes the role of the state in all local programs and ends the excessive involvement of the government. *Romero-Barcelo v. Donovan*, 722 F.2d 882, 886 (1st Cir. 1983).

The present petitioner maintains that it is important that this Court address what the court in *Romero-Barcelo, supra*, at 886, has recognized as the tension between the competing policies of efficient planning and decentralized administration which are embodied in the Job Training Partnership Act.

I.

THE DECISION RENDERED BY THE SECRETARY AS AFFIRMED BY THE ELEVENTH CIRCUIT, IGNORED THE EXPRESS CONGRESSIONAL INTENT TO DE-CENTRALIZE THE AUTHORITY FROM THE FEDERAL GOVERNMENT TO THE SEVERAL STATES AND LOCAL ENTITIES UNDER THE JOB TRAINING PARTNERSHIP ACT OF 1982.

The effect of the order of the Secretary is to resurrect the federally centralized administration of JTPA grants, in contravention of the clearly expressed intent of Congress.

The 97th Congress enacted the JTPA to replace the Comprehensive Employment and Training Act (CETA), a federally sponsored job training program. 1982 U.S.C.C.A.N. 2636-2659 (App. D, pp. 49a-58a). CETA had proven less than extravagantly successful; "informed opinion seems to suggest that *excessive federal involvement* was partially to blame for CETA's problems." *Hernandez-Colon v. Secretary of Labor*, 835 F.2d 958 (1st Cir. 1988). With the failures of CETA in focus, Congress designed the JTPA and opined that the new law would "substitute state management for federal management of

the job training function, recognize the role of the state in all local programs, and end the excessive involvement of the federal government." *Id.* at 961, N.3, *citing* S. Rep. No. 469, 97th Cong. 2d Sess. 2, reprinted in 1982 U.S. Code Cong. and Admin. News 2636, 2637. (App. D, p. 51a).

Congress was also guided by four basis principles it deemed essential for an effective job training program. These required the Governor and private sector involvement, with emphasis on performance results.

First, Congress insisted that the new legislation provide for the involvement of the private sector in the design and administration of training programs.

Second, Congress expressed its desire that job training legislation recognize the true principles of federalism. The new legislation will recognize the role of the state in all local programs and end the excessive involvement of the federal government.

Third, the job training legislation was designed to truly be a training legislation and not an income maintenance program.

Fourth, the legislation contains an emphasis on performance. The 1982 legislation required standards for judging the programs by what they accomplish-by whether those trained are hired and earn more as a result of training. By the 1982 JTPA, Congress sought to end federal involvement with the process of how people are to be trained. Its purpose was to provide for measurement of the outcomes and remove the federal government from involvement in the details of program operations. 1982 U.S.C.C.A.N. 2637-2638 (App. D, p. 51a).

In recognition of these principles, which clearly supplanted the federal government from administration of the JTPA and gave the primary responsibility to the Governor, regulations were promulgated at 20 C.F.R. parts 626 through 638. The provision at 20 C.F.R. § 627.1 embodies the fundamental notions of federalism Congress sought to embrace in the JTPA. The provision required the Secretary and Governor to sign an agreement which specified that the:

> . . . guidelines interpretations and definitions adopted by the Governor shall, to the extent that they are consistent with the Act and applicable rules and regulations, be accepted by the Secretary.

20 C.F.R. § 627.1 (App. D, p. 29a).

Clearly, this provision captured the congressional intent to respect and defer to the autonomy of the states, and reinforced the system of dual sovereignty between the states and the national government, as established by the United States Constitution.

The Senate in discussing its notion of federalism, provided in relevant part:

> Under the legislation reported by the Committee, the state will be the key actor in the approval of job training programs. First, and perhaps most important, the state will define the structure of the delivery system through the determination of service delivery areas. This critical determination will be done by the Governor after receiving the proposals of local government and

> business officials. The Governor will also be in charge of approving local developed plans, of monitoring and auditing the performance of plans, of insuring fiscal responsibility and compliance with Federal mandates as well as of running statewide programs. In short, the basic supervisory role previously performed by the federal government will now be turned over to the state, the place where it really belongs.

1982 U.S.C.C.A.N. 2638 (App. D, p. 53a).

The Secretary and the Circuit Court have overlooked the law in determining that substantial evidence supports the disallowance. Both failed to apply the guidelines, definitions and interpretations of the Governor in determining whether the contracts violated the Act or regulations. Unlike most federal grant programs, the states did not accept JTPA funds with condition or understanding that expenditures must conform to the Secretary's interpretation of the Act and regulations. *Cf. Bennett v. Kentucky,* 105 S. Ct. 1544, 1552 (1985). Even under such other grants, the Supreme Court has reserved for later decision the questions of whether an agency could impose liability for expenditures made in reliance upon earlier interpretations by the agency or whether a state may be held liable where its interpretation of an ambiguous requirement is more reasonable than an interpretation by the agency after the grants were made. *Bennett* at 1552-1553.

Under JTPA, Florida took the funds on USDOL's regulatory promise that the Secretary would accept Florida's definitions and interpretations. In *Bennett,* without a regulation such as 20 C.F.R. § 627.1 before it, the Supreme Court refused to accept the Government's contention that the

Secretary "may rely on any reasonable interpretation of the requirements of Title I to determine that previous expenditures violated the grant conditions." *Bennett* at 1552. The Eleventh Circuit's holding in this case would allow USDOL to override the Governor's guidelines, interpretations, and definitions even though USDOL had no guidelines, interpretations or definitions, of its own and in spite of the regulation that required USDOL to accept the Governor's interpretations. *See* 20 C.F.R. § 627.1 (1984).

The Eleventh Circuit also overlooked 20 C.F.R. § 629.34, which required states to administer procurement systems that reflect state and local law, rules and regulations as determined by the Governor. 20 C.F.R. § 629.34. The applicable standard was the guidelines, definitions, interpretations, and procurement policies of the state. Because the contracts complied with this standard, there was no violation of the Act or regulations to support the sanction of repayment.

The matter before this Court involves an understanding and interpretation of the JTPA and its regulations. While the law and its regulations are complex, Congress was emphatically clear on its desire to recognize the role of the state in all local programs and to end the excessive involvement of the federal government. Legislative History of the JTPA at S. Rep. No. 469, 97th Cong. 2d Sess. 2 (1982), U.S. Code Cong. & Admin. News 1982, 2637.

II.

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH A SUPREME COURT DECISION AND WITH DECISIONS RENDERED BY OTHER CIRCUIT COURTS OF APPEALS.

The Eleventh Circuit Court of Appeals' decision in this case raises important issues of national significance and is in direct conflict with the law established by this Court in *Bennett v. Kentucky,* at 105 S. Ct. 1544, *supra,* a decision which involved the administration of federal grants at the state level, which similar federal funds were at issue in this case.

In *Bennett v. Kentucky, supra,* this Court reviewed efforts by the federal government to recover Title I educational funds which were allegedly misued by the State of Kentucky. In upholding the disallowance this Court observed that the federal government established the guidelines for allocation and use of the funds and the state agreed to comply those guidelines while utilizing said funds. *Id.* at 1552. However, this Court also held that the federal government could not resolve every possible ambiguity concerning the particular applications of the Title I requirements and refused to resolve any ambiguities in the Title I requirements against the federal government as the drafter of the grant agreement, opining that the government could not prospectively resolve every possible ambiguity concerning the application requirements of Title I.

The case at bar involves an agreement between Florida and the Seceretary of USDOL, where in direct contrast to the facts in Bennett, the Secretary of USDOL expressly agreed to accept the guidelines, interpretations and definitions adopted by the Governor, if such were not inconsistent with the JTPA law and

regulations. Contrary to the position furthered by this Court in *Bennett*, Florida was not accorded any deference regarding the authority the states were granted under the JTPA to have control over the policies and procedures related to the administration of the JTPA program.

The Eleventh Circuit case is also in direct conflict with the law in the Ninth Circuit, as set forth in *Chicano Education and Manpower Service v. Department of Labor,* 909 F. 2d 1320, 1327 (9th Cir. 1990), *citing Service v. Dulles,* 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957), which law requires administrative agencies to adhere to their own regulations. In the *Chicano* decision, the Ninth Circuit Court of Appeals reviewed a decision rendered by the Secretary of the U.S. Department of Labor under the CETA program, which required the repayment of funds expended in violation of the anti-nepotism regulation. However, the Court, holding that an agency must follow its own regulations, found that the Secretary erred as a matter of law by failing to consider the application of the agency's regulation which governed waiver of repayment in her decision, and consequently the Ninth Circuit remanded for such consideration of the regulation to be accorded by the Secretary. *Id.* at 1328.

Here, the Eleventh Circuit's affirmance of the Secretary's decision permits USDOL to violate its own regulations regarding record retention found at 20 C.F.R. § 629.35(e), by holding Florida and other JTPA programs accountable for contracts and records that have been properly destroyed pursuant to the federal retention provisions. In this case such had occurred even before USDOL conducted its audit of Florida's Revenue Account. As contracts for program years 1983 through 1985 had been destroyed during the audit and prior to the time of the trial, before the ALJ, USDOL's audit and disallowance of the Revenue Account covered a seven year

period, in total disregard of its own three year records retention regulation should not be allowed.

III.

THE ELEVENTH CIRCUIT HAS SANCTIONED A BLATANT DEPARTURE FROM LAW ESTABLISHED BY THE SUPREME COURT AND LAW ESTABLISHED IN ITS OWN CIRCUIT TO THE EXTENT THAT THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS.

The Eleventh Circuit, in *Florida Department of Labor v. U.S. Department of Labor,* 893 F.2d 1319 (11th Cir. 1990), echoed the established principle that reviewing Courts have the authority and responsibility to correct errors of law made by an agency during its decision making process. In *Florida Department of Labor, supra,* the Eleventh Circuit held that it will not allow misconceptions in law that arise during the agency decision-making process to stand but rather will exercise authority and responsibility to correct those errors of law made by the agency. *Id.* at 1320. In that case, the Court reviewed a Decision and Order issued by the Secretary of the U.S. Department of Labor which imposed prejudgment interest against the Florida Department of Labor. The issue was whether the Secretary had authority to collect interest from States. The court clearly recognized its independent obligation to consider the legal issue and also to consider whether either party had raised the issue below; however, the court held that an order cannot stand where the agency has misapplied the law, whether or not the issue was raised below. *Id.* at 1322.

In this case the Eleventh Circuit deviated from its holding in Florida Department of Labor, *supra,* by allowing the Secretary of USDOL to misapply the JTPA law and regulations

in several instances in support of his reversal of the decision of the ALJ. The Secretary's usurpation of the of the authority of the Governor is in direct conflict with the JTPA regulations at 20 C.F.R. § 627.1, which requires the Governor and the Secretary to sign a Governor/Secretary Agreement whereby the Secretary agreed to accept the guidelines, interpretations, and definitions adopted by the Governor if such were consistent with the Act and applicable rules and regulations. Contrary to the agreement which was executed between Florida and the Secretary where the Secretary vowed to respect and defer to the autonomy of the Governor, the Secretary has been allowed to unlawfully breach that agreement and usurp the authority accorded the Governor by Congress under the JTPA. Such action if allowed to stand will have far reaching and profound adverse effects on the JTPA training program nation wide.

The Court deviated from established law in the Circuit with regards to the blanket disallowances it sanctioned regarding the Title III contracts. A misapplication of the law occurred by the affirmance of the Secretary's decision to disallow costs associated with all of the Title III contracts and to deem them violative of 20 C.F.R. § 629.38(e)(2) for containing elements of both fixed unit and actual cost reimbursement contracts. There is no provision in the law or regulations which prescribes such elements in fixed unit contracts.

Likewise, the Eleventh Circuit's decision which sanctions the Secretary's disallowance of costs associated with contracts executed with Wagner Peyser funds, based on an alleged violation of 20 C.F.R. § 629.38(e)(2) is contrary to any requirements in the law or regulations. The USDOL conceded at the trial that the Wagner Peyser contracts were not required under the law or regulations to adhere to the requirements of 20 C.F.R. § 629.38(e)(2), yet, the erroneous legal standard applied to disallow the costs was permitted by the court without any

explanation. As the Eleventh Circuit failed to provide any explanation for the Secretary's failure to give recognition to the distinction in law between contracts funded pursuant to the JTPA and those funded pursuant to the Wagner Peyser Act, this case will generate confusion and conflict of legal authority throughout the Job Training Community across this country. Job training programs in all (50) fifty states will suffer legal vulnerability to the whims of the Secretary, absent any statutory or regulatory basis.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 1, 1996

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94-3613 & 95-2218

STATE OF FLORIDA, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

Petitioner,

versus

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petitions for Review of an Order
of the United States Department of Labor

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: ANDERSON and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

Appendix A

(Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ illegible
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED APRIL 9, 1996

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NOS. 94-3613 & 95-2218

D.C. Docket No. 92-JTP-17

STATE OF FLORIDA, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

Petitioner,

versus

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petitions for Review of an Order
of the United States Department of Labor

(April 9, 1996)

Before ANDERSON and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

This appeal arises from a Final Decision and Order of the

Appendix B

United States Secretary of Labor ("Secretary"), requiring the Florida Department of Labor and Employment Security ("FDLES") to remit to the United States Department of Labor ("DOL") profits it accumulated as a result of its administration of job training and placement programs funded by the Job Training Partnership Act, 29 U.S.C. §§ 1501 *et seq* , ("JTPA"), and the Wagner-Peyser Act, 29 U.S.C. §§ 49 *et seq*.[1] Because substantial evidence supports the Secretary's decision, we affirm.

I. BACKGROUND

The JTPA and the Wagner-Peyser Act provide, *inter alia*, grants of federal money to state and local governments to establish job training and placement programs for economically disadvantaged persons. The Governor of Florida has charged the FDLES with the responsibility of administering -the state's JTPA job programs.[2] In that capacity, the FDLES maintains a JTPA revenue account.

In 1991, a Grant Officer of the DOL, Office of the Inspector General, conducted an audit of the revenue account for the Florida program years 1983 through 1989. He determined that, during this period of time, the account had accumulated $961,003.00 in "net profits" which were "inappropriately charged to the training cost category."[3] (Grant Officer's Final

---

1. The final order of the Secretary is directly appealable to this court pursuant to 29 U.S.C. § 1578(a)(1).

2. For purposes of this opinion, references to the JTPA programs include job services funded by the Wagner-Peyser Act.

3. Wagner-Peyser Act appropriations were the source of $35,230.00 of the profits.

Determination at 2). The profits were derived from approximately 250 fixed unit price performance ("fixed unit") contracts made between the FDLES or one of its Service Delivery Areas ("SDAs") and various offices of the Florida Employment Security Job Service ("Job Service"), which provide job training and placement assistance.[4] In the Grant Officer's Opinion, the fixed unit method of contracting was not acceptable where it permitted one unit of the FDLES to earn profits on the federal funds distributed by another unit of FDLES. He noted also that, because the contractors' primary source of income was federal money, any losses incurred would be absorbed by the use of other federal funds. In the Grant Officer's view, this set of circumstances eliminated the normal profit-loss incentives for fixed unit contracting.[5] For this same reason he concluded that the contracts were not negotiated as arms-length transactions. He further found that the terms of the contracts did not comply with the regulations governing fixed unit contracts set forth at 20 C.F.R. § 629.38(e)(2).[6] Based on

---

4. According to the record, two types of contracts for job training and placement services were permissible under the JTPA — fixed unit and cost reimbursement. A fixed unit contract establishes a certain price for training and job placement. This method of contracting allows the contractor to make a profit if its actual costs fall below the contract price. By the same token, the contractor may incur a loss if its costs exceed the contract price. By contrast, a cost reimbursement contract provides that the contractor will be paid only the actual cost of training or placing a participant.

5. Evidence in the record indicates that the rationale behind fixed unit contracting is that, in a competitive marketplace, it provides contractors with the financial incentive to better serve more participants.

6. The current regulations governing the JTPA have been revised and renumbered and appear at 20 C.F.R., Parts 626 through 628, 631 through 634 (Cont'd)

these findings, he issued a final determination requiring that the profits be recaptured by the DOL.[7]

Thereafter, the FDLES sought review by an Administrative Law Judge ("ALJ"). 20 C.F.R. § 629.57. At the administrative

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(Cont'd)
and 636 through 638. The regulations cited in this opinion are those that were in effect during the period of time covered by the audit. Section 629.38(e)(2) provided in relevant part:

> Costs which are billed as a single unit charge do not have to be allocated or prorated among the several cost categories but may be charged entirely to training when the agreement:
>
> (i) Is for training;
>
> (ii) Is fixed unit price; and
>
> (iii) (A) Stipulates that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant into unsubsidized employment in the occupation trained for and at not less than the wage specified in the agreement[.]

According to the audit, the terms of the contracts impermissibly included payment for the direct placement of participants who received no training, full reimbursement to employers for on-the-job training and supportive services costs and eighty percent of all actual allowable training costs, in addition to the fixed unit costs.

7. The final determination confirmed that $73,448.00 of the profits could be "reprogrammed" into allowable JTPA services.

hearing conducted by the ALJ, the FDLES contended that the DOL failed to meet its burden of production to establish a *prima facie* case that its administration of the JTPA programs resulted in impermissible profits. It asserted that the Grant officer reviewed only one out of the approximately 250 contracts at issue in the audit, an agreement between the Manasota Industry Council, Inc.[8] and the FDLES (the "Manasota contract"). It maintained that the DOL could not presume, from reviewing the Manasota contract, that the remaining 249 contracts suffered from the same defects. Moreover, it argued that the Manasota contract should not even be considered because it had been the subject of a prior audit which resulted in a settlement agreement. Finally, it contended that it was entitled to retain the profits because the JTPA regulations permitted fixed unit contracting and a publication issued by the United States Office of Management and Budget ("OMB"), OMB Circular A-87, did not proscribe the generation of profits thereby.[9]

During the hearing, a witness for the DOL acknowledged that, except for the Manasota contract, the agreements from which the profits stemmed were not examined. Instead, the auditor considered only whether the contracting entities were units of the FDLES. He attached a list to the audit naming the parties to the agreements under investigation. In view of the dispute over whether a determination could be made without considering the actual terms of each contract, the ALJ directed

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8. The Manasota Industry Council, Inc. is one of the state's SDAs.

9. The OMB has issued various publications to provide guidance to state and local governments in administering job programs funded by federal grants. OMB Circular A-87 stated in relevant part that "[n]o provision for profit or other increment above cost is intended." OMB Circular A-87, *quoted in* 53 Fed. Reg. 40,352 (1988).

the FDLES to produce all of them for his review. However, counsel for the FDLES came to the hearing with only four contracts for submission into evidence, one from each of the program years 1986 through 1989.[10] She informed the ALJ that producing the remaining contracts would require the transportation of forty to fifty boxes of documents. She indicated that this was unnecessary because the terms of the four contracts proffered were essentially the same as the other agreements in issue. She did not dispute that all of the contracts listed in the audit were fixed unit contracts between various divisions of the FDLES and that profits had been generated as found by the Grant Officer. The ALJ accordingly accepted the proffer of the four contracts produced, which were admitted into evidence as Complainant's Exhibits 32 through 35.

In spite of this concession, the ALJ, in his subsequent decision, inexplicably stated that the only contract in evidence was the Manasota contract. He found that its terms did not comply with the fixed unit requirements of § 629.38(e)(2), but held that this single contract was not enough to sustain the DOL's burden of production to establish a *prima facie* case that all of the contracts likewise failed to conform. Next, the ALJ considered whether the profits were "necessary and reasonable" within the meaning of 20 C.F.R. § 629.37(a).[11] In this connection, the ALJ again observed that the DOL had failed to satisfy its initial burden of production. He also found that, although the practice of contracting between divisions of the

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10. According to the briefs, the contracts for the program years prior to 1986 had been destroyed in accordance with records retention regulations.

11. Section 629.37(a) stated in relevant part that, "[t]o be allowable, a cost must be necessary and reasonable for proper and efficient administration of the program."

FDLES created "an obvious conflict of interest," (ALJ's decision at 8), the regulations did not specifically require that contracts be negotiated at arms-length to be considered necessary and reasonable. For these reasons, and because the regulations did not expressly prohibit the state's retention of profits generated through its administration of the program, the ALJ concluded that the Grant Officer's determination should be reversed.[12]

The ALJ's decision was then reviewed by the Secretary. 29 U.S.C. § 1576(b). The Secretary found, contrary to the ALJ, that the DOL met its burden of production through the four contracts that were in evidence in addition to the Manasota contract. He noted that the attorney for the FDLES conceded at the administrative hearing that the four contracts were representative of all of the contracts involved in the audit. The Secretary found that an examination of the four contracts revealed that each of them contained terms in contravention of 629.38 (e) (2).[13] Specifically, in addition to a fixed unit price, the contracts permitted payment for the placement of participants who received no training and for certain actual training and supportive services costs. Thus, the agreements impermissibly included elements of both fixed unit and actual

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12. The ALJ also addressed whether a three-year statutory time limit for expending program funds had elapsed. This was relevant to whether the profits could be reprogrammed into permissible JTPA activities and is not an issue before the court on appeal.

13. We note that the agreements involving Wagner-Peyser Act funds did not fall within the scope of § 629.83(e)(2). With respect to those contracts, the DOL considered only whether they were negotiated at arms-length and whether the profits were necessary and reasonable. (*See* Admin. Tr. at 191).

cost reimbursement. The Secretary concluded that, because these agreements were representative of the others, it could be presumed that the remaining contracts were written in the same manner. With respect to whether the profits were necessary and reasonable, the Secretary found that the consistent pattern of excess earnings, year after year, belied a finding that the state's JTPA administrators were prudently managing the programs, incurring only the acceptable costs. The Secretary considered that the absence of regulations delineating criteria for arms-length negotiations did not excuse the state's failure to follow sound business practices. The Secretary consequently reversed the ALJ and reinstated the Grant Officer's final determination. The FDLES now appeals the decision of the Secretary.

II. DISCUSSION

This court's review of the Secretary's final order is governed by 29 U.S.C. § 1578(a) (3). It provides that "[r]eview shall be limited to questions of law and the Secretary's findings of fact shall be conclusive if supported by substantial evidence." The order and burden of proof in a JTPA administrative hearing are established by the regulations. They state:

> *Burden of production.* The [DOL] shall have the burden of production to support the Secretary's decision. To this end, the Secretary shall prepare and file an administrative file in support of the decision. Thereafter, the party or parties seeking to overturn the Secretary's decision shall have the burden of persuasion.

20 C.F.R. § 629.57(i).[14]

On appeal, the FDLES continues to urge that the Manasota contract was insufficient to meet the DOL's burden of production and did not constitute substantial evidence in support of the Secretary's decision. This argument is foreclosed, however, by the fact that there were four other contracts in evidence, which the state agrees were representative of all of the contracts. The FDLES does not dispute that those four contracts contained elements of both fixed unit and actual cost reimbursement in contravention of § 629.38 (e)(2). The DOL consequently met its burden of production with respect to this issue and the burden shifted to the FDLES to persuade the Secretary that the remaining contracts were somehow different. Not only did the FDLES fail to satisfy this burden, it insisted that the other contracts were of the same type. We find, therefore, that substantial evidence supports the Secretary's decision that none of the contracts qualified as fixed unit agreements written in accordance with § 629.38(e)(2).[15]

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14. The current version of this regulation is found in 20 C.F.R. § 627.802(e).

15. The FDLES also reiterates its position that the settlement agreement that arose out of the prior audit of the Manasota contract barred the DOL from relying on that document as evidence of the state's noncompliance with the regulations. This issue need not be resolved in view of our finding that the four other contracts constituted substantial evidence in support of the Secretary's decision. The FDLES additionally complains that the Grant Officer erroneously included among the disallowed costs, $45,139.00 in profits stemming from the Manasota contract. (Appellant's Initial Brief at 20-21). This assertion was not developed in the administrative proceedings. Consequently, we do not consider it on appeal. *See* 29 U.S.C.

(Cont'd)

We likewise find that substantial evidence supports the Secretary's finding that the profits were not necessary and reasonable to the efficient administration of the JTPA programs as required by § 629.37(a). Again, the FDLES claims that the DOL failed to meet its burden of production on this point. It does not deny, however, that its method of contracting resulted in a consistent pattern of profits over a period of years. Given the interrelated nature of the contracting entities, a prudent administrator would have scrutinized the level of funding expended in this manner even though the regulations did not specifically prohibit it. Testimony at the administrative hearing revealed that Florida's own Auditor General questioned the practice of fixed unit contracting between the various arms of the FDLES and suggested that it seek advice from the DOL as to whether it was appropriate. Florida's Governor chose not to follow this course of action. (Admin. Tr. at 99, 101, 144, 167). We find, therefore, that the DOL's burden of production was satisfied and it was up to the FDLES to persuade the Secretary that the profits were necessary and reasonable. It failed in its effort.[16]

(Cont'd)

§ 1578 (a) (3) ("No objection to the order of the Secretary shall be considered by the court unless the objection shall have been specifically and timely urged before the Secretary.").

16. The FDLES has insisted throughout this case that, because the regulations permitted fixed unit contracting, it is entitled to retain the profits generated thereby. Even if the contracts had conformed to the fixed unit criteria contained in § 629.38(e)(2), the fact that the regulations allowed this form of contracting does not translate into a finding that the fixed unit method of contracting was necessary and reasonable to the efficient administration of the program.

Appendix B

III. CONCLUSION

Our review convinces us that substantial evidence supports the Secretary is final order requiring the FDLES to remit the profits at issue in this case to the DOL. It is therefore AFFIRMED.

APPENDIX C — DECISION AND ORDER OF THE U.S. DEPARTMENT OF LABOR, OFFICE OF ADMINISTRATIVE LAW JUDGES RECEIVED MAY 6, 1994

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

Case No. 92-JTP-17

In the Matter of:

STATE OF FLORIDA, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

Complainant

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent

Appearances: Carolyn D. Cummings, Esq.,
On behalf of the Complainant

Frank P. Buckley, Esq.,
On behalf of the Respondent

Before: G. MARVIN BOBER,
Administrative Law Judge

Appendix C

DECISION AND ORDER

This case arises under the Job Training Partnership Act (JTPA), 29 U.S.C. § 1501 *et seq.*, and the regulations promulgated thereunder appearing at 20 C.F.R. § 626 *et seq.* The purpose of the JTPA is to train youths and unskilled adults for entry into the labor force, as well as to provide job training to the economically disadvantaged and others who face serious obstacles to obtaining employment.

Stipulations of Fact

The parties have agreed on the following facts:

1. From the inception of the JTPA to program year 1989,[1] Florida's Employment Service Job Service (ESJS) offices entered into contracts to provide job training and placement services to eligible participants;

2. The audit in question covered the period from the inception of the JTPA through program year 1989;

3. The JTPA, Wagner Peyser Act, regulations, and cost principles did not prohibit the use of fixed unit price performance-based contracts by governmental entities during the period covered by the audit;

4. Revenue in excess of cost was generated from the contract performance and service provision of ESJS;

5. The regulations and cost principles did not prohibit

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1. The JTPA program year begins on July 1 of the fiscal year for which JTPA funds are appropriated. 29 U.S.C. § 1571(a).

the earning of revenue in excess of cost by governmental entities during the period covered by the audit;

6. The JTPA, Wagner Peyser Act, regulations and cost principles did not require that profits properly earned by governmental entities be recaptured by the United States Department of Labor (USDOL);

7. The JTPA and its regulations delegated authority to the Governor to establish policy directions on profits and on the fixed unit price performance-based contracting method and to the extent that they were consistent with the JTPA and applicable rules and regulations, they would be accepted by the Secretary of Labor;

8. Florida was obligated to accept guidelines adopted by the Governor if consistent with the JTPA and its regulations;

9. During the period covered by the audit, USDOL did not promulgate any rules or regulations which prohibited the use of fixed unit price performance-based contracts;

10. During the period covered by the audit, USDOL did not promulgate any rules or regulations which prohibited the generation of profits;

11. The first official interpretation by USDOL on the utilization of fixed unit price performance-based contracts and on the disposition of revenue in excess of cost was issued in the Federal Register on March

13, 1989, with an effective date of July 1, 1989;

12. USDOL did not deem profits to be program income until July 1, 1989;

13. USDOL did not promulgate any rules or regulations as guidance on contract negotiation; and

14. The interpretative regulation has no retroactive effect on the period between 1982 and July 1, 1989.

Issues

By agreement of the parties, the following issues remain for resolution:

1. Whether the Florida Department of Labor and Employment Security (DLES) must return to USDOL net profits realized from contract performance by ESJS offices under fixed unit price performance-based contracts;

2. Whether DLES inappropriately charged profits to the training cost-category;

3. Whether the contractual terms in question violated provisions of 20 C.F.R. § 629.37(a), 20 C.F.R. § 629.38(e)(2), and OMB Circular A-87;[2]

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2. These provisions upon which USDOL relied during its audit of DLES are contained within the 1992 JTPA regulations. The regulation contained in 20 C.F.R. § 629.37(a) now appears at 20 C.F.R. § 627.435(a) in the current regulations. 20 C.F.R. § 627.435(a) (1993). The previous regulation at 20 C.F.R. § 629-38(e)(2) no longer appears in the current JTPA regulations.

Appendix C

4. Whether the Division of Labor, Employment and Training (DLET), ESJS and the service delivery areas (SDAs), negotiated contracts at arm's length;

5. Whether fixed unit price performance-based contracting method is a permissible form of contracting with respect to the questioned costs; and

6. Whether the three-year availability period for the funds in question has lapsed.

Summary of Facts

DLES is the administrative recipient of JTPA funds for the Governor of Florida. On September 18, 1991, USDOL, Office of the Inspector General, issued a final audit report based on its investigation of the JTPA revenue account maintained by DLES. Specifically, the audit focused on revenue accrued from the 1984 program year to the 1989 program year. Upon receipt of the audit report, the State of Florida submitted a proposed resolution of the audit findings on October 24, 1991. However, since USDOL found Florida's proposed resolution to be unsatisfactory, the USDOL Grant Officer commenced the initial and final determination process pursuant to 20 C.F.R. § 629.54(d).[3] (CX-1 at A-12.)[4]

The Grant Officer issued his initial determination on December 17, 1991. Following this initial determination,

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3. For the current version of this regulation, *see* 20 C.F.R. § 627.606 (1993).

4. The following abbreviations will be used herein: Complainant's Exhibit — "CX;" Respondent's Exhibit — "RX;" and the hearing transcript — "Tr."

USDOL and DLET convened in Washington, D.C., for an informal resolution meeting. As the informal meeting yielded no settlement of the case, the Grant Officer issued a final determination on March 18, 1992. In his final determination, the Grant Officer concluded that $961,003.00 in JTPA revenues accumulated during the 1984 to 1989 program years by DLES should be disallowed. Of this amount, the Grant Officer determined that $887,555.00 should be returned to USDOL and that $73,448.00 could be reprogrammed for use in JTPA-related training services as long as the reprogrammed funds were obligated prior to June 30, 1992. Finally, the Grant Officer concluded that Florida's policy with respect to the use of fixed unit price performance-based contracts needed to be expanded to include other contracting methods. (CX-1 at A-8.)

Shortly thereafter, Complainant filed a timely request for hearing with the Office of Administrative Law Judges (OALJ) pursuant to 20 C.F.R. § 655.630.[5] In accordance with Complainant's request for judicial/administrative review of the Grant Officer's final determination, a hearing was conducted on July 19, 1993, in Tallahassee, Florida. During the course of the hearing, both parties were afforded a full opportunity to present testimony and submit evidence under the provisions of the JTPA. At the close of the hearing, the parties were permitted to submit post-hearing briefs. (Tr. at 284.)

Complainant's Motion for Summary Judgment

Before moving to the merits of this case, I must address Complainant's motion for summary judgment. Summary judgment is proper only when the pre-trial record demonstrates

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5. *See also* 20 C.F.R. § 627.801 (1993).

that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Furthermore, in considering Complainant's summary judgment motion, I must view the underlying facts and all reasonable inferences drawn therefrom in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Nonetheless, once the moving party has met its burden under Federal Rule 56(c), the opposing party must do more than merely show that there is a metaphysical doubt as to the material facts. *Matsushita*, 475 U.S. at 574, 586.

With respect to issue five, whether fixed unit price performance-based contracts are permissible under the JTPA, I find no issue of material fact presented in this case. In fact, both USDOL and DLES agree that this form of contracting was used during the period in question. Rather, the dispute arises as to whether or not such contracts were prohibited under the JTPA regulations in force during the period of the audit.

A fixed unit price performance-based contract is a contract which directs the payment of unit amounts upon the performance of specified services. (CX-1 at 69.) While such contracts may violate the current JTPA regulations, both sides agree that, prior to 1992, there were no regulations prohibiting the use of fixed unit price performance-based contracts. *See* Stipulation 9. Therefore, even viewing the facts in a light most favorable to USDOL, I find that the use of fixed unit price performance-based contracts during the period of 1984 to 1989 did not violate the JTPA or the accompanying regulations. Accordingly, Complainant is entitled to summary judgment on this issue.

Appendix C

All of the remaining issues in this case present questions of material fact that must be resolved by an examination of the merits of this case. Therefore, granting summary judgment on any of these remaining issues would be improper. *See* Fed. R. Civ. P. 56(c). As a result, I am granting only partial summary judgment. More specifically, I will grant Complainant's motion for summary judgement solely on the issue of whether fixed unit price performance-based contracting is permitted by the JTPA. In all other respects, Complainant's motion must be denied.

DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to 20 C.F.R. § 629.57(i),[6] USDOL has the initial burden of production in this case. This means that USDOL must put forth evidence sufficient to establish a *prima facie* case in support of the alleged JTPA violations. This burden requires USDOL to produce relevant evidence "sufficient to enable reasonable person to draw from it the inference sought to be established." McCormick, *Evidence*, 789-790 (2d ed. 1972). Once USDOL has met its *prima facie* burden, the burden of production then shifts to DLES to show compliance with the pertinent provisions of the JTPA. *Maine v. United States Dept. of Labor*, 669 F.2d 827 (1st Cir. 1982). Nonetheless, the ultimate burden of persuasion rests with DLES throughout the entire case. 20 C.F.R. § 629.57(i). The burden of persuasion never shifts to USDOL.

With respect to the first issue of the case, whether DLES inappropriately charged profits to the training cost category, 20 C.F.R. § 629.38(e)(2) provides the relevant law. During the period of the audit, 20 C.F.R. § 629.38(e)(2) set forth three

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6. *See also* 20 C.F.R. § 627.802(e) (1993).

requirements to be met before a cost may be billed entirely to the training category. In such cases, the agreement between the program recipient and the service provider must be for training, must be fixed unit price, and must stipulate "that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant. . . ." 20 C.F.R. § 629.38(e)(2) (1988).

In support of its contention that DLES violated this regulation, USDOL offers only one contract between DLES and Manasota Industry Council, Inc. (Manasota). The Manasota contract does appear to violate the provisions of 20 C.F.R. § 629.38(e)(2) in that the contract contains both fixed unit price characteristics and cost reimbursement characteristics. (RX-3 at 6; Tr. at 202.) However, USDOL produces the Manasota contract alone as evidence that all of the 250 contracts that were the subject of the audit violated 20 C.F.R. § 629.38(e)(2) as well. In fact, the auditor himself admitted that he never even examined the remaining 249 contracts for violations of the JTPA regulations. (Tr. at 218, 220.)

The fact that one contract out of 250 violated 20 C.F.R. § 629.38(e)(2) does not allow a reasonable person to infer that all 250 contracts violated the same provision without any further evidence. Therefore, I find that USDOL has failed to meet its initial burden of production to substantiate its claim that DLES violated 20 C.F.R. § 629.38(e)(2). Without offering further evidence, USDOL cannot expect to overcome even the relatively weak burden of establishing a *prima facie* JTPA violation solely on the basis of the Manasota contract.

The next issue to be decided is whether the DLES contracts violated 20 C.F.R. § 629.37(a), a catch-all regulation with the basic requirement that all costs be "necessary and reasonable

for proper and efficient administration of the [JTPA] program. . . ." Although the scope of this regulation is rather broad, any violation thereunder must be substantiated by the production of specific evidence. Again, however, USDOL bases its finding that the 250 contracts violate 20 C.F.R. § 629.37(a) solely upon an examination of the Manasota contract. Being that information drawn exclusively from the Manasota contract is the only evidence USDOL has produced to support a *prima facie* violation of 20 C.F.R. § 629.37(a), I find that USDOL has failed to meet its preliminary burden of production on this issue as well.

USDOL next alleges that DLES has violated the provisions of Office of Management and Budget (OMB) Circular A-87. The State of Florida adopted the provisions of OMB Circular A-87 in October of 1983 for its own administration of the JTPA program. (RX-1 at A-6). Therefore, there is no question that OMB Circular A-87, issued on January 15, 1981, governs the contracts covered by the audit.[7] In a statement of policy intent, OMB Circular A-87 provides that "[n]o provision for profit or other increment above cost is intended." (RX-1 at G-1.)

USDOL contends that DLES earned substantial profits through its administration of the JTPA program between programs years 1984 and 1989. Clearly, DLES does not dispute this claim. Therefore, the issue to be determined with respect to this alleged violation of OMB Circular A-87 is whether such

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7. In fact, the JTPA regulations contained no provision requiring adherence to OMB circulars during the audit period. The OMB circulars were not incorporated into the regulations with respect to direct and indirect costs until 1991. *See* 20 C.F.R. § 629.37(b) (1991). Prior to 1991, the allowability of direct and indirect costs was governed by 41 C.F.R. 29-70.102 (1984).

profits were improper at the time they were earned. This determination involves an inquiry into both fact and law.

As even Jim Woodward, who conducted the audit in the present case, has admitted, the earning of profits is not a *per se* violation of the JTPA. (Tr. at 245.) Furthermore, nothing in the JTPA or the accompanying regulations prohibited the earning of profits during the period of the audit. (RX-1 at 38-39.) In fact, according to Edward Donahue, who drafted the initial and final determinations, USDOL issued no directives on how excess JTPA income must be categorized until July of 1989. (RX-1 at 52.)

Additionally, the OMB Circular merely states that profits are not "intended" under the JTPA. Stating that the earning of profits is not "intended" cannot be interpreted to mean that profits are prohibited under the JTPA. In fact, OMB did not even purport to address the issue of profits earned by a state under the JTPA. (CX-1 at F-4.) Therefore, OMB Circular A-87 has no applicability to the present case. Since there is no other mention of profits in the circular, I find that the earning of profits by DLES during program years 1984 to 1989 did not violate any provision of OMB Circular A-87.

The next issue is the central issue, and perhaps the only genuine issue, in the present case. USDOL alleges that the several divisions of DLES (i.e. DLET, ESJS and the SDAs) failed to negotiate JTPA contracts at arm's length. As Jim Woodward admitted at the trial, despite USDOL's claim that individual contractual terms violated specific JTPA regulations, the fixed unit price performace-based contracts themselves did not necessarily violate the JTPA. Instead, it is alleged that the general method of contracting employed by the

State of Florida that may be violative of the JTPA. (Tr. at 249-250.)

Again, Woodward concedes that he did not examine the individual contracts within his audit in order to determine that the fixed unit price performace-based contracts were not negotiated at arm's length. (Tr. at 218, 220, 230.) Likewise, Woodward did not look at the criteria according to which DLES awarded JTPA contracts. (Tr. at 248.) Rather, Woodward examined the general scheme for issuing JTPA contracts in the State of Florida. (Tr. at 222, 248.) In other words, Woodward's audit focused primarily on the parties involved in the contracting, as opposed to the contracts themselves. Based on this, Woodward concluded that the contracts in question had the "appearance" of not having been negotiated at arm's length. (Tr. at 250.)

The record does contain a factual basis for Woodward's findings. DLET, a division of DLES, is primarily responsible for formulating state policy with respect to the JTPA. DLET also oversees the procurement process within the various SDAs and monitors the local Job Service Offices. DLET nonetheless entered into several contracts with ESJS, another division of DLES, to provide training and placement services using federal JTPA funds. (RX-1 at A-55.) The resulting contracts placed DLES in the position of being the federal JTPA fund recipient, the state JTPA administrator, as well as a JTPA service provider. In effect, the State of Florida's system gave it a vertical monopoly over federal JTPA funds with respect to the contracts in question, thereby creating an obvious conflict of interest.

As a legal basis for challenging this scheme, USDOL relies upon 20 C.F.R. § 629.37(a) and OMB Circular A-87. While the

general requirement of 20 C.F.R. § 629.37(a) that all JTPA costs be "necessary and reasonable" was in effect during program years 1984 to 1989, there was no language in OMB Circular A-87 that specifically addressed arm's length negotiation during the period of the audit. In fact, while the specific language which USDOL quotes in its brief does list arm's length bargaining as an important consideration in determining the reasonableness of a cost under the JTPA, this language did not appear in the Federal Register until October of 1988. 53 Fed. Reg. 40352, 40354 (1988) (proposed October 14, 1988). Clearly, these proposed amendments to OMB Circular A-87 were not in force during the audit period. Thus, although there was a general requirement that all costs be "reasonable" during the period of the audit, there existed no criteria for determining what constituted a "reasonable" cost. Therefore, OMB Circular A-87 provides no objective for a finding that DLES' contracting practices violated the JTPA at the time of the audit.

The final issue in this case is whether the three-year availability period has lapsed with respect to the funds in question. According to Section 161(b) of the JTPA, DLES must spend JTPA program funds within three years of the receipt of those funds. Any unspent program funds revert to the federal government at the end of the three-year period. 29 U.S.C. § 1571(b).

I find, however, that Section 161(b) is inapplicable to the present case. Section 161(b) applies to program funds only, and up until 1989, profits were not named as program funds. On March 13, 1989, USDOL issued a proposed interpretative rule which states that revenues generated in excess of cost retain their federal character and must be used for JTPA program purposes or be subject to recapture after the three-year

availability period expires. *See* Stipulation 11. As Edward Donahue admitted, this rule did not become effective until July 1, 1989; therefore, it does not govern the period covered by the audit.[8] (RX-1 at 52, 103.) *See also* Stipulation 12, 14. Thus, since USDOL remained silent on the issue of profits as program income until July of 1989, DLES need not have treated excess revenue as program income during the audit period. *See* 20 C.F.R. § 629.32 (1988). Accordingly, as the three-year availability period did not apply to profits earned prior to 1989, I find that no lapse of Section 161(b) occurred.

Finally, I find no basis for applying retroactively the JTPA regulations to which USDOL has cited. According to the Supreme Court, "[r]etroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In fact, the current law prohibits retroactive application of federal statute and administrative rules and regulations unless the plain language of the statute or regulation so dictates. *id.* Where no such express language exists, retroactivity is presumptively barred unless clear congressional intent commands otherwise. *Landgraf v. USI Film Prods.*, No. 92-757, 1994 U.S. Lexis 3292, at *67 (April 26, 1994).

Finding no express language in the JTPA or the accompanying regulations to support their retroactive application, I must conclude that there is no basis for enforcing the regulations on which USDOL bases its findings retrospectively. Likewise, I find no legislative intent to grant authority to USDOL to enforce rules retroactively under the JTPA. I also recognize that, "[e]ven where some substantial

8. The JTPA regulations themselves did not even define profits as program income until December of 1992. 20 C.F.R. § 627.450(a)(1)(iv) (1993).

justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." *Bowen*, 488 U.S. at 208-209.

In sum, since I find no specific violation of the JTPA or the accompanying regulations as set forth during the period of the audit, I find that DLES need not return to USDOL net profits realized from contracts with ESJS offices during the period covering program years 1984 through 1989. Accordingly, the Grant Officer's final disallowance of $961,003.00 in excess JTPA revenues must be reversed.[9]

ORDER

Accordingly, it is ORDERED that Complainant's motion for summary judgment be GRANTED IN PART AND DENIED IN PART.

It is FURTHER ORDERED that the Final Determination of the Grant Officer be hereby REVERSED.

s/ G. Marvin Bober
G. MARVIN BOBER

Administrative Law Judge

Dated: MAY 2 1994
Washington, D.C.
GMB/mdm

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9. It is important to note that DLES' scheme for administering JTPA funds violates the current regulations. The DLES system only survived administrative review by virtue of the fact that such practices were not specifically addressed by the JTPA regulations until after the audit had been completed. Accordingly, this opinion should not be viewed as a ratification the State of Florida's implementation of the JTPA.

APPENDIX D — RELEVANT REGULATIONS, STATUTES, EXECUTIVE ORDER, AND SENATE REPORT

20 CFR § 627.1

Subpart A — Planning Procedures

§ 627.1 Eligible grant recipient.

To establish a continuing relationship under the Act, the Governor and the Secretary shall sign a Governor/Secretary Agreement. The agreement shall consist of a statement assuring that the State shall comply with (1) the Job Training Partnership Act and the applicable rules and regulations and (2) the Wagner-Peyser Act, as amended, and all applicable rules and regulations. The agreement shall specify that guidelines, interpretations and definitions adopted by the Governor shall, to the extent that they are consistent with the Act and applicable rules and regulations, be accepted by the Secretary.

20 CFR § 629.34

§ 629.34 Procurement.

Subject to the provisions of Section 107 of the Act, recipients and subrecipients shall administer procurement systems that reflect applicable State and local law, rules and regulations as determined by the Governor.

Appendix D

20 CFR 629.35

§ 629.35 Management systems, reporting and record-keeping

(a) The Governor shall ensure that financial systems within the State provide fiscal control and *accounting* procedures sufficient to (1) permit preparation of required reports; (2) permit the tracing of funds to a level of expenditure adequate to establish that funds have not been used in violation of the restrictions on the use of such funds; and (3) demonstrate compliance with matching requirements. (Secs. 104(b)(9), 164(a)(1), 165(a)(1), 156(c)(2), and 182).

(b) The financial management system and the participant data system shall provide federally-required records and reports that are uniform in definition, accessible to authorized Federal and State staff, and verifiable for monitoring, reporting, audit and evaluation purposes (Secs. 165(a)(1), 165(a)(2), and 182).

(c) Pursuant to Section 165(a) of the Act, the Governor shall ensure that records shall be maintained of each participant's enrollment in a JTPA program in sufficient detail to demonstrate compliance with the relevant eligibility criteria attending a particular activity and with the restrictions on the provision and duration of services and specific activities authorized by the Act.

(d) The Governor shall ensure that records shall be maintained of such participant information as may be necessary to develop and measure the achievement of performance standards established by the Secretary.

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(e) The Governor shall insure that procedures are developed for retention of all records pertinent to all grants and agreements, including financial, statistical, property and participant records and supporting documentation, for a period of three years from the date of obligation of funds. Records for nonexpendable property shall be retained for a period of three years after final disposition of the property.

(f) The aforementioned records will be retained beyond the three years if any litigation or audit is begun or if a claim is instituted involving the grant or agreement covered by the records. In these instances, the records will be retained until the litigation, audit or claim has been finally resolved.

(g) In the event of the termination of the relationship with a subrecipient, the Governor of SDA grant recipient, the Governor or SDA grant recipient shall be responsible for the maintenance and retention of the records of any subrecipient unable to retain them.

20 CFR § 629.37

§ 629.37 Allowable costs.

(a) *General.* To be allowable, a cost must be necessary and reasonable for proper and efficient administration of the program, be allocable thereto under these principles, and except as provided herein, not be a general expense required to carry out the overall responsibilities of the Governor or subrecipient. Costs charged to the program shall be consistent with those normally allowed in like circumstances in nonfederally sponsored activities and with applicable State and local law, rules or regulations, as determined by the Governor.

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(b) Direct and indirect costs shall be charged in accordance with 41 CFR 29-70.102.

(c) The Governor shall issue guidelines on allowable costs for SDA and statewide programs that shall include provisions that:

(1) Costs resulting from violations of, or failure to comply with, Federal, State or local laws and regulations are not allowable:

(2) Entertainment costs are not allowable;

(3) Insurance policies offering protection against debts established by the Federal Government are not allowable JTPA costs; and

(4) Personal liability insurance for PIC members is allowable.

(d) The costs of legal expenses required in the administration of grant programs is allowable. Legal services furnished by the chief legal officer of a State of local government or staff solely for the purpose of discharging general responsibilities as a legal officer are unallowable. Legal expenses for the prosecution of claims against the Federal Government are unallowable.

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20 CFR § 629.38(e)(2)

§ 629.38(e)(2) Classification of costs.

* * *

(e) In assigning costs to the training category pursuant to paragraph (a) of this section, the Governor shall ensure that:

* * *

(2) Costs which are billed as single unit charge, do not have to be allocated or prorated among the several costs categories but may be charged entirely to training when the agreement:

(i) Is for training;

(ii) Is fixed unit price; and

(iii) (A) Stipulates that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant into unsubsidized employment in the occupation trained for and at not less then the wage specified in the agreement.

* * *

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29 U.S.C. § 1501

§ 1501. Congressional declaration of purpose

It is the purpose of this chapter to establish programs to prepare youth and unskilled adults for entry into the labor force and to afford job training to those economically disadvantaged individuals and other individuals facing serious barriers to employment, who are in special need of such training to obtain productive employment.

29 U.S.C. § 1511

§ 1511. Establishment of service delivery areas

(a) Proposals; proposed designations; requests

(1) The Governor shall, after receiving the proposal of the State job training coordinating council, publish a proposed of service delivery areas for the State each of which —

(A) is comprised of the State or one or more units of general local government;

(B) will promote effective delivery of job training services; and (C)(i) is consistent with labor market areas or standard metropolitan statistical areas, but this clause shall not be construed to require designation of an entire labor market area; or

(ii) is consistent with areas in which related services are provided under other State or Federal programs.

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(2) The Council shall include in its proposal a written explanation of the reasons for designating each service delivery area.

(3) Units of general local government (and combinations thereof), business organizations, and other affected persons or organizations shall be given an opportunity to comment on the proposed designation of service delivery areas and to request revisions thereof.

(4)(A) The Governor shall approve any request to be a service delivery area from —

(i) any unit of general local government with a population of 200,000 or more;

(ii) any consortium of contiguous units of general local government with an aggregate population of 200,000 or more which serves a substantial part of a labor market area; and

(iii) any concentrated employment program grantee for a rural area which served as a prime sponsor under the Comprehensive Employment and Training Act.

(B) The Governor may approve a request to be a service delivery area from any unit of general local government or consortium of contiguous units of general local government, without regard to population, which serves a substantial portion of a labor market area.

(c) If the Governor denies a request submitted under subparagraph (A) and the entity making such request alleges

that the decision of the Governor is contrary to the provision of this section, such entity may appeal the decision to the Secretary, who shall make a final decision within 30 days after such appeal is received.

(b) Final designation by Governor

The Governor shall make a final designation of service delivery areas within the State. Before making a final designation of service delivery areas for the State, the Governor shall review the comments submitted under subsection (a)(3) of this section and requests submitted under subsection (a)(4) of this section.

(c) Redesignations

(1) In accordance with subsection (a) of this section, the Governor may redesignate service delivery areas no more frequently than every two years. Such redesignations shall be made not later than 4 months before the beginning of a program year.

(2) Subject to paragraph (1), the Governor shall make such a redesignation if a petition to do so is filed by an entity specified in subsection (a)(4)(A) of this section.

(3) The provisions of this subsection are subject to section 1515(c) of this title.

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29 U.S.C. § 1515

§ 1515. Review and approval of plan

(a) Times for publication of plan and modifications

(1) Not less than 120 days before the beginning of the first of the two program years covered by the job training plan —

(A) the proposed plan or summary thereof shall be published; and

(B) such plan shall be made available for review and comment to —

(i) each house of the State legislature for appropriate referral;

(ii) appropriate local educational and other public agencies in the service delivery area, and

(iii) labor organizations in the area which represent employees having the skills in which training is proposed; and

(C) such plan shall be reasonably available to the general public through such means as public hearings and local news facilities.

(2) The final plan, or a summary thereof, shall be published not later than 80 days before the first of the two program years and shall be submitted to the Governor in accordance with section 1513(d)(2) of this title. Any

modification shall be published not later than 80 days before it is effective and shall be submitted to the Governor in accordance with such section.

(b) Governor's approval of plan: criteria, time, and petitions opposing

(1) The Governor shall approve the job training plan or modification thereof unless he finds that —

(A) corrective measures for deficiencies found in audits or in meeting performance standards from previous years have not been taken or are not acceptably underway;

(B) the entity proposed to administer the program does not have the capacity to administer the funds;

(C) there are inadequate safeguards for the protection of funds received;

(D) the plan (or modification) does not comply with a particular provision or provisions of this chapter or of regulations of the Secretary under this chapter, or

(E) the plan (or modification) does not comply with the criteria under section 1531(b) of this title coordinating activities under this chapter with related program activities.

(2) The Governor shall approve or disapprove a job training plan (or modification) within 30 days after the date that the plan (or modification) is submitted, except that if a petition is filed under paragraph (3) such period shall be extended to 45

days. Any disapproval by the Governor may be appealed to the Secretary, who shall make a final decision of whether the Governor's disapproval complies with paragraph (1) of this subsection within 45 days after receipt of the appeal.

(3)(A) Interested parties may petition the Governor with 15 days of the date of submission for disapproval of the plan or modification thereof if —

(i) the party can demonstrate that it represents a substantial client interest,

(ii) the party took appropriate steps to present its views and seek resolution of disputed issues prior to submission of the plan to the Governor, and

(iii) the request for disapproval is based on a violation of statutory requirements.

(B) If the Governor approves the plan (or modification), the Governor shall notify the petitioner in writing of such decisions and the reasons therefor.

(c) Redesignation of service delivery areas and private industry councils

(1) If a private industry council and the appropriate chief elected official or officials fail to reach the agreement required under section 1513(b) or (d) of this title and, as a consequence, funds for a service delivery area may not be made available under section 1514 of this title, then the Governor shall redesignate, without regard to sections[1] 1511(a)(4) and (c)(1) of

1. So in original. Probably should be "section".

this title, the service delivery areas in the State to merge the affected area into one or more other service delivery areas, in order to promote the reaching of agreement.

(2) In any State in which service delivery areas are redesignated under paragraph (1), private industry councils shall, to the extent necessary for the redesignation, be reconstituted and job training plans modified as required to comply with sections 1512 and 1513 of this title. Services under an approved plan shall not be suspended while the council is reconstituted and the plan is modified.

(d) Authority of Secretary in single plan States

In any case in which the service delivery area is a State, the plan (or modification) shall be submitted to the Secretary for approval. For the purpose of this subsection, the Secretary shall have the same authority as the Governor has under this section.

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Executive Order 12612 — Federalism

SOURCE: The provisions of Executive Order 12612 of Oct. 26, 1987, appeal at 52 FR 41685, 3 CFR, 1987 Comp., p. 252, unless otherwise noted.

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

SECTION 1. *Definitions.* For purposes of this Order:

(a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various level of government.

(b) "State" or "States" refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

SEC. 2. *Fundamental Federalism Principles.* In formulating and implementing policies that have federalism implications. Executive departments and agencies shall be guided by the following fundamental federalism principles:

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(a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.

(b) The people of the States created the national government where they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign government State and national, is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their life.

(e) In most areas of governmental concern, the States uniquely progress the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administration for our domestic concerns and the surest bulwarks against antirepublican tendencies."

(f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

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(g) Acts of the national government — whether legislative, executive or judicial in nature — that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of — and should encourage opportunities for — individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

SEC. 3. *Federalism Policymaking Criteria.* In addition to the fundamental federalism principles set forth in section 2, Executive department and agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There should be strict adherence to constitutional principles. Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the necessity for such action. To the extent practicable, the states should be consulted before any such action is implemented. Executive Order No. 12372 ("Intergovernmental Review of Federal Programs") remains in effect for the programs' and activities to which it is applicable.

(b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For the purposes of this Order:

(1) It is important to recognize the distinction between problems of national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them).

(2) Constitutional authority for Federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States.

(c) With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary nor desirable.

(d) When undertaking to formulate the implement policies that have federalism implications, Executive departments and agencies shall:

(1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States.

(2) Refrain, to the maximum extent possible, from

establishing uniform, national standards for programs and, when possible, defer to the States to establish standards.

(3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.

SEC. 4. *Special Requirements for Preemption.* (a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is in some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

(e) When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department of agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings.

SEC. 5. *Special Requirements for Legislative Proposals.* Executive departments and agencies shall not submit to the Congress legislation that would:

(a) Directly regulate the states in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions;

(b) Attach to Federal grants conditions that are not directly related to the purpose of the grant; or

(c) Preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

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SEC. 6. *Agency Implementation.* (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring the implementation of this Order.

(b) In addition to whatever other actions the designated official may take to ensure implementation of this Order, the designated official shall determine which proposed policies have sufficient federalism implications to warrant the preparation of a Federalism Assessment. With respect to each such policy for which an affirmative determination is made, a Federalism Assessment, as described in subsection (c) of this section, shall be prepared. The department or agency head shall consider any such Assessment in all decisions involved in promulgating and implementing the policy.

(c) Each Federalism Assessment shall accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A-19, and shall:

(1) Contain the designated official's certification that the policy has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of this Order,

(2) Identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(3) Identify the extent to which the policy imposes additional costs or burdens on the States, including the likely source of funding for the States and the ability of the States to fulfill the purposes of the policy; and

(4) Identify the extent to which the policy would affect the States' ability to discharge traditional State governmental functions, or other aspects of State sovereignty.

SEC. 7 *Government-wide Federalism Coordination and Review.* (a) In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A-19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of those authorities, shall take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order.

(b) In submissions to the Office of Management and Budget pursuant to Executive Order No. 12291 and OMB Circular No. A-19, Executive departments and agencies shall identify proposed regulatory and statutory provisions that have significant federalism implications and shall address any substantial federalism concern. Where the departments or agencies deem it appropriate, substantial federalism concerns should also be addressed in notices of proposed rule-making and message submitting legislative proposals to the Congress.

SEC. 8. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

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LEGISLATIVE HISTORY
P.L. 97-300

JOB TRAINING PARTNERSHIP ACT

P.L. 97-300, see page 96 Stat. 1322

Senate Report (Labor and Human Resources Committee) No. 97-469, June 9, 1982 [To accompany S. 2036]

House Report (Education and Labor Committee) No. 97-537, May 17, 1982 [To accompany H.R. 5320]

House Conference Report No. 97-889, Sept. 28, 1982 [To accompany S. 2036]

Cong. Record Vol. 128 (1982)

DATES OF CONSIDERATION AND PASSAGE

Senate July 1, September 30, 1982

House August 4, October 1, 1982

The Senate bill was passed in lieu of the House bill. The Senate Report (this page) and the House Conference Report (page 2705) are set out.

SENATE REPORT NO. 97-469

The Committee on Labor and Human Resources, to which was referred the bill (S. 2036) to provide for a job training program and for other purposes, having considered the same,

reports favorably thereon with an amendment and recommends that the bill as amended do pass.

THE NEED FOR LEGISLATION

The authorization of the comprehensive and Training Act expires this year. This nation needs a new job training program for the drop-out youth who are not prepared for employment, for welfare recipients who need training to escape from dependency, for the economically disadvantaged who cannot compete in the labor market without help. We also need a training program for the dislocated worker who needs new skills for the new jobs being created by the changing economy. The federal government has a responsibility to help meet these training needs.

New Legislation must be based on four basic principles which are essential for an effective job training program. These principles are:

First, the new legislation must provide for the involvement of the private sector in the design and administration of training programs. Under the current CETA system, business involvement has been limited to Title VII programs, and there is no requirement for the involvement of the private sector in all aspects of the program. Such involvement is essential because it is the private sector which will employ the graduates of the training programs and it is only those who will employ the graduates who can really define the kinds of training programs that are needed.

Second, job training legislation must recognize the true principles of federalism. The current CETA system limits the

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Governor to Balance of State and special statewide programs and bypasses him altogether in other cases which provide for a direct Federal to local government relationship. The new legislation will recognize the role of the state in all local programs and end the excessive involvement of the federal government.

Third, job training legislation must truly be a training legislation and not an income maintenance program. The current CETA system has provisions relating to mandatory allowances and public service employment for which justifications include providing income transfers as well as job training and employment. The new legislation repeals these provisions.

Fourth, the legislation must insist on performance. The current CETA system does not have any effect means of measuring program results or penalizing non-performance. The new legislation will provide standards for judging the programs by what they accomplish — by whether those trained are hired and earn more as a result of training. It will end federal involvement with the process of how people are to be trained. It will provide for measurement of the outcomes and remove the Federal government from involvement in the details of program operations.

In addition to these basic principles, the legislation must address two other items of major concern.

First, new legislation must emphasize the need to provide training for the dislocated workers who have no realistic prospect of returning to the job from which they are laid off. Other federal laws emphasize income transfers for these

workers. Under the best of circumstances hundreds of thousands of workers in the automobile industry and other basic industries may not return to their lifetime work. We must identify those workers who cannot go back to their old jobs and provide retraining for the new and expanding occupations which exist in the economy at the present time.

Finally, new legislation must provide for coordination between the multiciplicity of employment and training programs that now exist. Coordination under current law is fragmentary at best.

The bill which has been reported by the Committee is based on these principles and addresses these concerns.

PRIVATE SECTOR INVOLVEMENT

The first principle the bill is designed to address is the active involvement of private industry. This objective is accomplished through the private industry councils. The council will have a majority of members from the private sector with other representatives coming from local government, education, community-based organizations, labor unions, economic development organizations and the public employment service. The private industry council will plan the training programs. The program plan will specify how job training in a community will be carried out. The plan will identify occupations for which skill training will be conducted. It will select organizations to provide the training. It will specify arrangements for administering the program in the community. It will determine how resources are allocated. The completed program plan will be prepared by the private industry council but it will be submitted jointly with the local

government in order to establish the kind of private-public partnership that all witnesses agreed is essential for an effective job training program. If agreement between these parties cannot be reached, the Governor will settle the issue. Private sector involvement will not be limited to the local level although that is the essential place in which training programs are run. Private sector involvement is also provided for in the state job training council in which the private sector will also have a majority of representatives. That state job training council will review locally developed plans and will also have substantial involvement in state-wide administration. This expanded role for the private sector is one of the fundamental principles on which the new job training legislation is based.

FEDERALISM

The second major principle on which the legislation is based is on a recognition of the distinct but legitimate roles of federal, state and local government. The responsibilities of each will change from what they are under current law. Under the legislation reported by the committee, the state will be the key actor in the approval of job training programs. First, and perhaps most important, the state will define the structure of the delivery system through the determination of service delivery areas. This critical determination will be done by the Governor after receiving the proposals of the state job training council and after reviewing the proposals of local government and business officials. The Governor will also be in charge of approving locally developed plans, of monitoring and auditing the performance of plans, of insuring fiscal responsibility and compliance with Federal mandates as well as of running statewide programs. In short, the basic supervisory role previously performed by the federal government will now be

turned over to the state, the place where it really belongs. It is important to add that the state will provide basic guidelines for the planning of local area plans.

Local elected officials will work in partneship with representatives from their businesses, education and labor communities in the planning and implementation of job training programs. They will appoint the members of the private industry councils and will work with PICs to set local priorities in consort with state goals and design programs to meet them.

The federal government will be responsible for developing nationwide performance standards, operating national programs, conducting research, demonstration and evaluation activities, and monitoring state performance.

TRAINING, NOT INCOME MAINTENANCE

The third principle on which this legislation is based is that a training program must be truly a training program and not income maintenance. The Comprehensive Employment and Training Act provided not only training but also income to participants in the form of public service employment through the provisions mandating allowances for persons in institutional training and through the work experience program in which persons were paid to perform work regardless of whether it increased their employability. The new legislation has a single objective. It is to prepare people for employment. The object is not income maintenance and the provisions relating to public service employment and mandatory allowances in the old law have all been repealed. The provisions of the legislation are carefully designed to ensure that at least 70 percent of all the funds expended will go into direct training

expenses with the remainder going only for essential administrative support and the kinds of supportive services without which participants would not be able to take advantage of the training opportunities.

PERFORMANCE NOT PROCESS

The next principle on which the bill is based is that the federal role must be to establish standards for program performance. In the past, the federal government prescribed at considerable length and in considerable detail how training programs are to be conducted, which too often resulted in excessive regulation. This bill departs from that practice. Instead, the role of the federal government is to specify what the results of training programs must be. The bill requires the Secretary to establish performance standards which will measure the results achieved by federal, state, and local training programs, leaving the private industry council free to design specific programs in order to achieve those specified outcomes. These standards will ensure that adults who go into training earn more than they did before they entered the program and that youth are provided the employability skills they need to secure private sector employment. If these results are achieved, the federal objectives will have been met. The federal responsibility is not to specify how the results are to be accomplished but to ensure that the expenditure of federal funds achieves the objectives intended by the legislation. This is an important step and consistent with government-wide emphasis on deregulation which is so critical to true local decision-making and more effective program management.

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DISLOCATED WORKERS

The bill contains a separate title to provide retraining for dislocated workers — that is, workers who have no reasonable prospect of returning to their old employment because of plant closing or other dislocations in the economy. The evidence is clear that there are at least one half million jobs in the automobile industry-related employment that are permanently lost even if sales return to their previous levels. In the past we have ended to provide unemployment insurance and other income maintenance benefits for these . . .

* * *

JOB TRAINING PARTNERSHIP

The Committee also feels that the mix of governmental and business representatives is useful and appropriate, but that the role of Federal agency heads should be advisory. Therefore, the Committee bill includes federal agency heads in the membership as non-voting members.

Appendix D

TITLE III: ADMINISTRATIVE AND GENERAL PROVISIONS

SUPERVISION OF THE PROGRAM — THE ROLE OF THE GOVERNOR AND OF THE SECRETARY OF LABOR

The core of the Training For Jobs program is its reliance on local decision-making by the private industry council and the development of an effective private-public partnership to plan and administer job training programs. However, the Committee recognizes the need to ensure that such local decision-making is consistent with statutory criteria and that there be effective mechanisms for ensuring that the program produces results.

Under the bill, the basic supervisory role is given to the Governor, acting with the advice of the State Job Training Council. The Governor determines service delivery areas, the Governor prepares the State goals and objectives to guide local planning, the governor approves local plans, the Governor resolves differences between the private industry council and the local government. Further, it is the State which is required to establish fiscal control and accounting procedures and it is the State which is responsible for ensuring financial and compliance audits. The Committee does not intend that there be additional layers of bureaucracy in the program — rather it has transferred to the State level these functions previously performed by the Secretary, in general through the Department's regional offices.

The Secretary does retain a role in the management of the system. By far the most important one is the setting of performance criteria. The Committee cannot overemphasize that the Federal role is not to determine how programs are to be

designed or administered but rather to set the standards against which program performance is to be measured. The Committee does not expect lengthy Federal regulations; it does expect prompt promulgation of effective performance criteria. (see below)

The Secretary of Labor does retain management responsibilities for the local programs which are specified in sections 304 and 306. Most importantly, he is required to monitor recipients and subrecipients to ensure that they are complying with the Act.

PERFORMANCE STANDARDS

It is a fundamental premise of this bill that job training is an investment in human capital which will pay dividends by increasing the productive capacity of the participants as measured by in- . . .

* * *

Supreme Court, U.S.
FILED
JAN 13 1997
CLERK

No. 96-741

In the Supreme Court of the United States

OCTOBER TERM, 1996

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly affirmed, as supported by substantial evidence, the Secretary's order disallowing $961,003 of net profits that petitioner, the Florida Department of Labor and Employment Security, accumulated through its administration of job training and placement programs funded by the Job Training Partnership Act (JTPA), 29 U.S.C. 1501 *et seq.*, and the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-741

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 3a-13a) is unreported. The final decision and order of the Secretary of Labor (App., *infra*, 1a-12a) the Secretary's order denying petitioner's request for reconsideration (App., *infra*, 13a-17a), and the decision and order of the ALJ (Pet. App. 14a-28a) also are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1996. A petition for rehearing was denied on July 1, 1996. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on September 30, 1996. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Job Training Partnership Act (JTPA), 29 U.S.C. 1501 *et seq.*, and the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.*, provide federal grants to state and local governments to establish and maintain job training and placement programs. Pet. App. 4a. The Governor of Florida has assigned petitioner the responsibility for administering those federally-funded job programs; petitioner maintains a JTPA revenue account for the federal funds. As relevant here, petitioner contracted with one of its subagencies, the Florida Employment Security Job Service, and with various Service Delivery Areas (SDAs) created by the Governor under 29 U.S.C. 1511, to provide the training and placement services. Pet. App. 4a-5a.; App., *infra*, 1a-3a.

This case arose out of an audit of petitioner's JTPA revenue account conducted by the Office of the Inspector General of the Department of Labor (DOL) pursuant to 29 U.S.C. 1575(b). Pet. App. 4a; App., *infra*, 1a. Following that audit, a DOL grant officer issued a Final Determination on March 13, 1993, concluding that for the years 1983 through 1989, the account made $961,003 in net profits from numerous contracts between petitioner and various offices of the Job Service agency and the SDAs. Pet. App. 4a. Because the contracts established, in advance, a set price for training and placement services, they were considered fixed unit contracts, as distinguished from contracts that reimburse contractors for actual costs incurred. *Id.* at 5a & n.4. The grant officer, however, found that the fixed unit method of contracting did not

meet the criteria in 20 C.F.R. 629.38(e)(2) (1984), the applicable regulation then in effect. Pet. App. 5a. Specifically, the grant officer found that contracting method unacceptable because the contracts were between petitioner and other state entities and thus were not negotiated at arms-length. *Ibid.* As a result, petitioner was able to make a profit on JTPA grant money by consistently setting a fixed price higher than its actual costs. *Ibid.* The grant officer concluded that the profits should be disallowed, since they were not properly considered training costs. *Id.* at 5a-6a.

2. Pursuant to petitioner's request, a hearing was held before an administrative law judge (ALJ). Pet. App. 19a. The ALJ concluded that the grant officer's determination should be reversed, reasoning that DOL failed to establish its prima facie case that petitioner had violated applicable regulations. *Id.* at 28a. The ALJ further concluded that the regulations did not require arms-length negotiation of JTPA contracts and did not prohibit petitioner's retention of accumulated profits. *Id.* at 21a-26a.

The Secretary of Labor reviewed the decision pursuant to 29 U.S.C. 1576(b). Contrary to the ALJ, the Secretary found that DOL had established its prima facie case through four contracts produced by petitioner that the ALJ had inexplicably overlooked but that petitioner's counsel had conceded were representative of the relevant contracts. App., *infra*, 4a-7a. Based on that concession, the Secretary examined the four record contracts and concluded that all of petitioner's contracts with other state entities contained terms that contravened 20 C.F.R. 629.38(e)(2) (1984), the DOL regulation governing fixed unit contracts. App., *infra*, 5a-6a. The Secretary also held that the

$961,003 in profits did not qualify as a cost "necessary and reasonable for the proper and efficient administration of the program" under 20 C.F.R. 629.37(a) (1984). App., *infra*, 7a-8a. The Secretary relied on the fact that written summaries for each program year revealed a consistent pattern of excess earnings of nearly one million dollars. *Ibid.* In light of that pattern, the Secretary found that petitioner's failure to adjust fixed unit prices was inconsistent with prudent management, especially in view of the fact that petitioner "was, for all practical purposes, on both sides of the contracting process given their monitoring responsibilities over the contracting entities." *Id.* at 8a. Furthermore, given that the intra-agency contracts were not conducted at arms-length, the Secretary concluded both that the excess earnings could not qualify as necessary and reasonable program costs, and that the fixed unit mode of contracting was not permissible. *Id.* at 9a-11a. Accordingly, the Secretary ordered petitioner to repay to the Department of Labor the excess earnings of $961,003.

3. Petitioner sought review in the United States Court of Appeals for the Eleventh Circuit, challenging the evidentiary support for the Secretary's determination. Petitioner urged that the one contract that DOL produced—referred to as the Manasota contract—was insufficient to meet the agency's burden of production and did not amount to substantial evidence in support of the decision. Pet. App. 11a. The court rejected that argument, finding it "foreclosed * * * by the fact that there were four other contracts in evidence, which the state agrees were representative of all of the contracts." *Ibid.* Based on that concession, the court concluded that "none of the

contracts qualified as fixed unit agreements written in accordance with § 629.38(e)(2)." *Ibid.* Because the court found that those four contracts amply supported the Secretary's decision in this regard, the court found it unnecessary to address petitioner's argument that an earlier settlement agreement barred the Department of Labor from relying on the Manasota contract. *Id.* at 11a n.15. The court also refused to consider petitioner's argument that profits stemming from the Manasota contract were erroneously disallowed, because petitioner had not developed that argument below. *Ibid.*

The court further held "that substantial evidence supports the Secretary's finding that the profits were not necessary and reasonable to the efficient administration of the JTPA [training] programs as required by § 629.37(a)." Pet. App. 12a. In light of evidence establishing that the contracts in question were between interrelated entities and had generated excess earnings for a number of years, the court affirmed the Secretary's determination that DOL had met its initial burden of showing that the profits were neither necessary nor reasonable, and that petitioner had failed to rebut that showing through persuasive evidence to the contrary. *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted.

1. The court of appeals reasonably rejected petitioner's evidentiary challenges to the Secretary's determination that the contracts did not qualify as fixed unit contracts under 20 C.F.R. 629.38(e)(2)

(1984) and that the excess earnings did not qualify as necessary and reasonable program costs. Abandoning that substantial evidence attack, petitioner now raises a panoply of new arguments, which may not be raised for the first time before this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); see also 29 U.S.C. 1578(a)(3) ("No objection to the order of the Secretary shall be considered by the court unless the objection shall have been specifically and timely urged before the Secretary.").

In any event, petitioner's contentions are meritless. First, petitioner attempts to reframe the case by arguing that the Secretary's decision, as affirmed by the court of appeals, violates the underlying policies of the JTPA. Pet. 5-9. Although petitioner is correct (see Pet. 6, 7-8) that the Act envisions a significant supervisory role for the States, there is no merit to petitioner's suggestion (Pet. 7) that this case therefore implicates principles of federalism. In this regard, petitioner errs in relying (Pet. 7-9) on the regulatory requirement that the Secretary accept "guidelines, interpretations and definitions adopted by the Governor * * * to the extent that they are consistent with the Act and applicable rules and regulations." Pet. 7 (quoting 20 C.F.R. 627.1 (1992)). That regulatory provision, which requires acceptance of the State's guidelines only "to the extent * * * consistent" with federal law, refutes petitioner's contention (Pet. 8) that "the states did not accept JTPA funds [on the] condition * * * that expenditures must conform to the Secretary's interpretation of the Act and regulations." Moreover, although petitioner asserts that the State relied on the Secretary's promise to "accept Florida's defini-

tions and interpretations," *ibid.*, it points to no applicable state interpretations.

2. Petitioner also argues (Pet. 10) that the decision below conflicts with this Court's decision in *Bennett* v. *Kentucky Dep't of Education*, 470 U.S. 656 (1985). In fact, *Bennett* upheld, as clearly supported by the applicable regulations, the agency's disallowance of funds granted to a State under Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, finding it unnecessary to determine the amount of deference to which the responsible federal agency was entitled. 470 U.S. at 670. Nothing in *Bennett* supports petitioner's contention that it is entitled to deference in its interpretation of the JTPA and applicable regulations.

Nor is there merit to petitioner's argument (Pet. 11) that the decision below conflicts with the principle expressed in *Chicano Education & Manpower Services* v. *Department of Labor*, 909 F.2d 1320, 1327 (9th Cir. 1990), that administrative agencies must follow their own regulations. That argument merely restates the proposition that the Secretary's decision in this case conflicts with 20 C.F.R. 627.1 (1992). The Department of Labor fully agrees that agencies are bound by their regulations, but that principle is of no avail to petitioner because the court of appeals correctly affirmed the Secretary's decision in this case as consistent with his regulations.*

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* Petitioner also asserts that the Secretary misapplied 20 C.F.R. 629.38(e)(2) (1984), which only applies to JTPA funds, to disallow net profits generated by contracts executed with Wagner-Peyser funds. Pet. 13. Not only did petitioner fail to raise that issue below, see 29 U.S.C. 1578(a)(3), but, as the court of appeals noted, Pet. App. 9a n.13, the agency did not apply that regulation in determining that the profits generated by

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1997

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the Wagner-Peyser contracts were not necessary and reasonable, and that those contracts were not negotiated at arms-length.

APPENDIX

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR

WASHINGTON, D.C.

Date: December 5, 1994
Case No. 92-JTP-17

IN THE MATTER OF

STATE OF FLORIDA, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, COMPLAINANT

v.

UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Job training Partnership Act (JTPA or the Act), 29 U.S.C. §§ 1501-1791 (1988), and the regulations issued thereunder at 20 C.F.R. Parts 626-638 (1993).

BACKGROUND

The Grant Officer issued a Final Determination on March 13, 1993, disallowing $961,003, which the Florida Department of Labor and Employment Security (DLES) accumulated in excess revenues charged to its JTPA program during the Program Years (PY)

1984-1989. Respondent's Exhibit 1: Administrative File (A.F.) at 11-15. The Grant Officer's disallowance was based on an audit report by the U.S. Department of Labor's Office of the Inspector General (OIG), *Id.* at 46-96, which examined the revenue sources of the State's JTPA Revenue Account, G-3880 - Job Service Contract Profit/Loss.[1] The State used $800,000 of these funds to repay part of a $1.1 million debt resulting from unallowable Comprehensive Employment and Training Act (CETA) program costs previously disallowed by the Grant Officer. The primary objective of the OIG audit was to identify the sources of the contract revenues in the account, the use of the revenues and the State's compliance with cost principles and program regulations in the accumulation of these revenues. A.F. at 58. The auditors found that the use of the G-3880 Account funds violated the terms of the CETA settlement which required the State to repay the debt with non-Federal funds. *Id.* at 48. The State replenished the funds in the G-3880 Account. *Id.* at 54.

The OIG also found the accumulation of the funds in the G-3880 Account to be inappropriate and contrary to applicable Federal regulations and cost principles. *Id.* at 52-53. The account funds were the net accumulated profits realized by excess charges over actual costs by Florida Employment Service Job Service (ESJS) local offices to provide placement services for JTPA participants. The ESJS local offices entered into approximately 250 fixed unit price, performance-based (FUPPB) contracts with another Florida Department of Labor agency, the Division of Labor, Employment and Training (DLET) and various JTPA

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[1] Detail Summary, A.F. at 68-75.

Service Delivery Area (SDA) subgrantees which were monitored by DLET. DLET is the State Labor Department agency responsible for the administration of JTPA and the Wagner-Peyser Act acted and supervises the ESJP and the Bureau of Job Training. DLET also has oversight of the procurement activity of the SDA subgrantees and local ESJS offices. The OIG determined that the use of FUPPB contracts, as contrasted to cost reimbursement contracts, between units of the same State department was not acceptable, for such contracts could not be considered arm's length transactions. A.F. at 62.

The auditors further determined that the statutory three year time limit to expend program funds had elapsed and recommended that the funds in the G-3880 Account be returned to the U.S. Department of Labor since the funds could not be reprogrammed for JTPA activities. *Id.* at 63.

The Grant Officer's Initial Determination reflected the OIG's findings with regard to the inappropriateness of the contractual relationship between DLES and the ESJS. The Grant Officer also specifically stated that the State was aware that its use of fixed unit cost contracts containing terms which provided for payment for activities and costs other than the regulatory permissible payment for placement after training did not qualify for the single unit charging provisions of the JTPA regulations at 20 C.F.R. § 629.38(e)(2).[2] *Id.* at 20.

---

[2] 20 C.F.R. § 629.38 entitled *[c]lassification of costs* provides in part:

(e) . . .

(2) Costs which are billed as a single unit charge do not have to be allocated or prorated among the several cost

The Grant Officer's Final Determination reiterated, with greater detail, that the fixed unit cost contracts entered into by DLET and the SDA's with the ESJA local offices failed to qualify pursuant to the regulations at 20 C.F.R. § 629.38(e)(2). *Id.* at 13.

The State timely appealed the Grant Officer's Final Determination and a hearing was held on July 19, 1993. The presiding Administrative Law Judge (ALJ) issued a Decision and Order (D. and O.) on May 2, 1994, reversing the Grant Officer's Final Determination. D. and O. at 10. The Grant Officer excepted to the ALJ's decision and the Secretary accepted the case for review on June 8, 1994.

DISCUSSION

The ALJ determined that the U.S. Department of Labor failed to meet its burden of production because it did not put forth enough evidence to establish a *prima facie* case to support allegations that FDLES violated JTPA regulations. *Id.* at 5-6. The substance of the ALJ's determination was that the U.S. Department of Labor put into evidence only one contract,

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categories but may be charged entirely to training or retraining services when the agreement:

(i) Is for training under title II or for retraining under title III, . . .

(ii) Is fixed unit price; and

(iii) (A) Stipulates that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant into unsubsidized employment in the occupation trained for and at not less than the wage specified in the agreement; . . .

(1991)

This regulations does not appear in the current regulations.

that being between the Manasota Industry Council, Inc. (Manasota) and DLES, as representative of all 250 FUPPB contracts pertaining to the profits accrued in Account G-3880. The ALJ found that the Manasota contract was in fact violative of the pertinent regulation at 20 C.F.R. § 629.38(e)(2) since the contract contained both fixed unit cost characteristics and cost reimbursement characteristics. He determined, however, that "[w]ithout offering further evidence, USDOL cannot expect to overcome even the relatively weak burden of establishing a *prima facie* JTPA violation solely on the basis of the Manasota contract." *Id.* at 6.

The ALJ apparently did not consider the four contracts that FDLES introduced into evidence at the hearing [3] which he determined were satisfactory to decide the issues involved in the case. ALJ's Order Denying Motion to Admit, issued Nov. 22, 1993, slip op. at 2. FDLES counsel admitted at the hearing that the four contracts were essentially the same as the balance of the 250 contracts and representative of them.[4] When these contracts are examined, each

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[3] Admitted into evidence as Complainant's Exhibits (CX) 32, 33, 34 and 35.

[4] The colloquy between the ALJ and FDLES Counsel Cummings:

> Counsel: I have contracts for you for program years 1986, 1987, 1988, and 1989.
>
> ALJ: So that's five [sic] years?
>
> Counsel : Yes, sir.
>
> ALJ : Okay. How are those contracts different from the remaining contracts? . . .

contains characteristics of both fixed unit cost contracts and cost reimbursement contracts, and include a payment schedule for the placement of participants without training,[5] all of which is in contravention of specific regulatory requirements. *See* fn. 2 at 3.

Admittedly, a sample of four contracts, or five in the record if the Manasota contract is also considered, may not be statistically impressive, except for the fact that every contract in the sample fails to meet the regulatory requirements for a single unit charge agreement. This factor in combination with FDLES counsel's assurance regarding the representativeness of the contracts submitted into evidence, and the State's destruction of the pertinent contracts from PY 1983-1985,[6] persuades me to reverse the

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> Counsel : Essentially, Your Honor, I don't feel they're any different. They're all fixed unit price performance based contracts, they all set forth that full payment will be received once placement has been made in the . . . [sic].
>
> ALJ : So there's essentially no difference between any of them?
>
> Counsel : Basically, Your Honor, I don't think so. They were all written by various service delivery areas. We have 24 service delivery areas throughout the State of Florida, geographically located throughout the state. But those service delivery areas wrote the those contracts pursuant to policy instructions, so far as the specific elements of 629.38 (e)(2), those elements are within those contracts.

Transcript (Tr.) at 22-23.

[5] CX 32 at II, 1-3; CX 33 at 5; CX 34 at 6-9, 23; CX 35 at 6, 11.

[6] ALJ's Order Denying Motion to Admit at 2.

ALJ's holding that the Grant Officer failed to meet the burden of production.

Since I have determined that the Grant Officer has met the burden of production, the burden of persuasion devolved upon FDLES to show that the balance of the contracts entered into between DLET and the SDA subgrantees with the ESJS local offices met the regulatory requirements governing FUPPB contracts. This they did not do, although the subject contracts, at least for PY 1986-1989 were apparently retrievable by the State. Tr. at 21-22.

The ALJ next determined that the U.S. Department of Labor failed to meet its burden of production with regard to JTPA regulation at 20 C.F.R. § 629.37(a).[7] This regulation requires that all costs be "necessary and reasonable for the proper and efficient administration of the [JTPA] program. . . ." Again, the ALJ relies solely upon the U.S. Department of Labor's examination of only the Manasota contract, but he neglects the information that was also readily available in JTPA Revenue Account G-3880. A.F. at 68-75. The Detail Summary of the account lists each subgrant by Program Year and JTPA title, and indicates that 160, or 65%, of the contracts produced a high enough level of profits to make up the total losses incurred by the remaining 35% of the contracts and still show an excess net profit of almost $1 million. *Id.* at 62.

This information in the Detail Summary of Account G-3880 should have been available to the DLES JTPA administrators after each Program Year, and a cursory analysis would have revealed that the grants entered into by the DLET and the SDA agencies with

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[7] This regulation is at 20 C.F.R. § 627.435 (1993).

the ESJS local offices were excessive in their funding support of the ESJS local offices' JTPA program. The level of profit and the consistent pattern of contracts belies a finding that the State's JTPA administrators were prudently managing the program, incurring only those costs which were necessary. This failure to reduce contracting funding is all the more compelling when one reorganizes that DLET was, for all practical purposes, on both sides of the contracting process given their monitoring responsibilities over the contracting entities. I therefore find grounds for reversing the ALJ's finding on this issue as well.

The ALJ likewise faults the Grant Officer's determination that the State violated the provisions of Office and Management and Budget (OMB) Circular A-87, which the State adopted in October, 1983, for its administration of the JTPA program. D. and O. at 7. The ALJ focuses on a phrase that appears in the Circular that states: "[n]o provision for profit or other increment above cost is intended." The ALJ concluded that since the Circular "merely states that profits are not 'intended' under the JTPA. Stating that the earning of profits is not 'intended' cannot be interpreted to mean that profits are prohibited under the JTPA." *Id.*

However, it is necessary to read the phrase within the context of the entire section which pertains to the principles governing allowable costs applicable to grants between State entities and the Federal government. The *Purpose and Scope* section set forth in Attachment A provides:

> 1. *Objectives.* This attachment sets forth principles for determining the *allowable* costs

> incurred by State . . . governments under grants . . . with the Federal government . . . . The principles are for the purposes of cost determination. . . . They are designed to provide that federally-assisted programs bear their fair share of costs recognized under these principles, except where restricted or prohibited by law. No provision for profit or increment above cost is intended. Emphasis provided.

A.F. at 85.

The last sentence modifies the previous sentence, which requires federal funds to pay the federal share of program costs, and that there be no allowance for more than the federal share. The word "intended" is not precatory, but is a form of the noun "intention," denoting a will, design or resolve to do or refrain from doing an act. Therefore, OMB Circular A-87 is applicable to the State's administration of its JTPA contracts and earned profits are not allowable costs.

The ALJ recognizes that the central issue in this case is that the case record contains a factual basis to determine that the State of Florida, through the several divisions of DLES, operated "a vertical monopoly over the federal JTPA funds with respect to the contracts in question, thereby creating an obvious conflict of interest." D. and O. at 8. The DLES was, with respect to the contracts with the ESJS, "the federal JTPA fund recipient, the state JTPA administrator, as well as a JTPA service provider." *Id.*

The ALJ held, however, that because the Grant Officer's Final Determination relied on the State's failure to use arm's length negotiation as a determinant that the costs charged to the JTPA were not

reasonable, and that the phrase "arms-length bargaining" as an important consideration in determining grant cost "reasonableness", first appeared in a Federal Register Notice revising OMB Circular A-87 was published subsequent to the audit, that therefore this fundamental aspect of sound business practice was inoperative in the determination of reasonable costs. I disagree. The lack of publication of a specific phrase doesn't negate the principle. The enmeshed relationships between the parties to the ESJS contracts signals a potential conflict of interest. Although the State produced its contracting procedures for the record (CX 36), this production does not rebut a presumption of a potential conflict of interest with the concomitant less than arm's length contract negotiations, given the pattern of significant profits earned by a unit of a State agency contracting with another unit the same State agency. I therefore find that there was a contravention of "sound management practices" and that such excess profits were not "necessary and reasonable for proper and efficient administration of the grant program", as required by the State's adoption of the earlier issuance of A-87.

I believe it appropriate to comment on the ALJ's discussion regarding the use of fixed unit price, performance based contracts in the JTPA program. There is no question that such contracting mode was permissible during the Program Years in question, nor is there any question that an entrepreneurial service provider would be allowed to make a profit if it was able to satisfy the terms of the contract for less cost than the negotiated amount. This mode of contracting requires, however, that the negotiations be conducted at arm's length. Where, however, the contracting parties are organizationally linked, there

has to be of necessity, a punctilious showing that the contracts were rigorously negotiated at arm's length.

The facts in this case are that intra-agency units used fixed cost contracts and the provider entities consistently, if not always, showed a significant profit of charges over costs. The factual burden of persuasion would have to be overwhelmingly convincing that the contracts had been let only after the most stringent negotiations and that the regulatory requirements governing single unit charge contracts were strictly adhered to. That is not the situation in this case. Substantially more than half of the contracts showed net profits that covered the losses of the other contracts, and the State netted almost $1 million. These results belie any claim of rigorous negotiation, written guidelines, notwithstanding.

In addition, the requirements allowing the use of single unit charge contracts found at 20 C.F.R. § 629.38(e)(2) which governed such contracts were not scrupulously followed. The contracts in the record failed to identify specific occupations trained for and their specified wage rates. Instead the contracts provided for gross numbers of participants to be served in a variety of ways to place them eventually into unsubsidized employment. While these are permissible contract goals, they are not within the regulatory requirements utilizing a single unit charge method of contracting.

The DLES used an allowable form of contracting but in an inappropriate situation. The ALJ's decision of May 2, 1994, is REVERSED.

Therefore, I find that the Grant Officer properly disallowed the $961,003 of excess profits accumulated by the State pursuant to the contracts between the DLES and the SDA's with the ESJS local offices.

The State of Florida Department of Labor and Employment Security IS ORDERED to pay such amount to the U.S. Department of Labor in non-Federal funds.

SO ORDERED.

/s/ ROBERT B. REICH
Secretary of Labor

Washington, D.C.

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR

WASHINGTON, D.C.

Date: January 20, 1995
Case No. 92-JTP-17

IN THE MATTER OF

STATE OF FLORIDA, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, COMPLAINANT

v.

UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

BEFORE: THE SECRETARY OF LABOR

ORDER DENYING REQUEST FOR RECONSIDERATION

Counsel for the State of Florida, Department of Labor and Employment Security (State) has requested that I review and reconsider my decision issued December 5, 1994. In that decision I reversed the Administrative Law Judge's (ALJ) Decision and Order (D. and O.) of May 2, 1994, and affirmed the Grant Officer's disallowance of $961,003 resulting from the excess profits accumulated by the State charged to its Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1501-1791 (1988), grants.

I note that generally, reconsideration is disfavored, *INS v. Doherty*, 112 S. Ct. 719. 724 (1992), and should be granted only to "correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). The JTPA language at Section 168(a)(3), 29 U.S.C. § 1578(a)(3), however, could be interpreted as requiring a party seeking judicial review of a Secretary's final order to specifically and timely urge all objections before the Secretary, prior to filing an appeal. Therefore, I have reviewed the State's request for reconsideration in light of the case record.

The State's request for reconsideration is denied.

DISCUSSION

A. The Burden of Production.

The ALJ determined that the Grant Officer failed to meet the burden of production pursuant to 20 C.F.R. § 629.57(i) (1988), because he relied on the wording of a single contract to conclude that 250 other contracts executed during a given time period between similar parties likewise violated the regulations governing fixed unit cost contracts.[1] D. and O. at 6. However, four other fixed unit cost contracts were introduced into evidence during the hearing by the State's counsel and averred to as representative of the 250 contracts at issue in this case. Transcript (Tr.) at 22-23. The ALJ, prior to issuing his decision, determined that the proffered contracts were "satisfactory to decide the issues involved in this audit."

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[1] *See also* 20 C.F.R. § 627.802(e) (1993).

ALJ's Corrected Order Denying Motion to Admit, issued Dec. 2, 1993, at 2.[2]

The regulations governing an ALJ's decision require that "[t]he decision of the ALJ shall be based upon the whole record. It shall be supported by reliable and probative evidence." 29 C.F.R. § 18.57(b) (1993). I found that the documentary evidence in the record, consisting in part of the Administrative File and the representative contracts, satisfied the Grant Officer's burden of production. *See State of Maine v. U.S. Dep't of Labor*, 669 F. 2d 827 (1st Cir. 1982). "A party will have satisfied his burden of production if the *evidence presented* is sufficient to enable a reasonable person to draw from it the inference sought to be established (emphasis supplied)." *Id.* at 830.

B. The Burden of Persuasion.

The State had the burden of persuasion to prove that the balance of the contracts it had in its possession,[3] in some 40 or 50 boxes, Tr. at 21-22, in fact complied with the regulations. The State did not introduce into evidence those other contracts, nor any summary or sample thereof. It is a fair inference, therefore, to conclude that the balance of the extant contracts were, as stated by the State's counsel, essentially no different from the contracts introduced into evidence.

On reviewing the contracts in the record, it is evident that they provide generally for placement

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[2] In that Order, the ALJ denied the Respondent's request to read as adverse to the Complainant all of the contracts which were not produced during discovery as required.

[3] The State apparently destroyed the contracts from Program Years 1983-1985. *See* ALJ's Corrected Order Denying Motion to Admit at 2.

activities, including placement without training, and not for training in specific occupations at agreed upon wage rates. Thus, they do not satisfy the regulatory requirements for fixed cost contracts. The regulation at 20 C.F.R. § 629.38(e)(2) (1991)[4] which governs the acceptability of single unit charge (fixed unit cost) contracts as exceptions to the statutory limitation on administrative expenditures,[5] must be strictly construed. *Texas Dep't of Commerce and Fort Worth Consortium v. U.S. Dep't of Labor*, Sec. Dec. and Order, Nov. 1, 1993, slip op. at 2-10, *appeal docketed*, No. 93-5543 (5th Cir. Nov. 30, 1993).

The State's failure to prove compliance with the regulation thereby tends to support rather than rebut the evidence indicating a violation of the regulations. *State of Maine*, 669 F. 2d at 831.

C. The Allowability of Profits.

The Grant Officer's response to the State's Motion for Reconsideration suggests that the section of the Final Decision regarding the nonallowability of profits may not be consistent with the Department's interpretation at the time of the underlying audit. Counsel for the Grant Officer refers to a Notice published in the Federal Register eliciting comments from the public regarding, among other things, the question of profits realized through the use of fixed unit cost contracts.[6] Although the Notice may be indicative of the Employment and Training Administration's prior uncertainty of how to address problems in the use of fixed unit cost contracts, it does not

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[4] This section does not appear in the current regulations.

[5] 29 U.S.C. § 1518 (1988).

[6] 53 Fed. Reg. 7989, 7992 (1988).

overcome the plain meaning of the language of the Objectives section of the governing cost principles adopted by the State for its administration of JTPA.

CONCLUSION

A review of the case record in light of the specific objections raised by the State fails to provide any reason for modification or reversal of my December 5, 1994 decision.

The State of Florida, Department of Labor and Employment Security's request for reconsideration IS DENIED.

SO ORDERED.

/s/ ROBERT B. REICH
Secretary of Labor

Washington, D.C.

Supreme Court, U.S.
FILED
FEB 7 1997
CLERK

No. 96-741

In The

Supreme Court of the United States

October Term, 1995

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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38 pp

DISCUSSION

The U. S. Department of Labor (hereinafter Respondent) has alleged on page 6 of its Brief for the Respondent in Opposition, that Petitioner "now raises a panoply of new arguments, which may not be raised for the first time before this Court." Respondent's allegations are clearly erroneous and without merit. Every argument raised by Petitioner in its Writ for Certiorari has been raised numerous times below, as substantiated by the record.

The arguments contained in Issue I with regards to principles of federalism have been prevalent throughout this litigation. The Job Training Partnership Act and its Legislative History, which is the legal basis upon which this matter reached the courts, embrace and echo the very principles of federalism which permeate this case. These issues were addressed in Petitioner's Post-Hearing Brief to the Administrative Law Judge, pages 5-7 and pages 44-45 (Appendix ("App."), *infra,* 1a-3a, 9a-10a). Likewise, Petitioner raised the same issues before the United States Court of Appeals for the Eleventh Circuit in its Initial Brief on pages 42 through 44 (App. 26a-28a) and in Petitioner's Suggestion for Rehearing En Banc before the United States Court of Appeals for the Eleventh Circuit on pages 4-5 and page 7 (App. 29a-30a, 32a-33a).

Petitioner's arguments contained in Issue II do not constitute new arguments before this Court but represent a basis for asserting the certiorari jurisdiction of the Supreme Court. Supreme Court Rule 10.1(a) clearly provides that a basis for asserting the jurisdiction of this Court is the presence of a Court of Appeals decision which conflicts with another decision of a Court of Appeals. Petitioner established in Issue II that the decision to be reviewed conflicts with other Court of Appeals decisions. Clearly such conflict could not be raised before a

conflicting decision was rendered by the United States Court of Appeals for the Eleventh Circuit.

In regard to arguments raised in Issue III, the underlying issues in this case have always centered around actions taken by Respondent, to the detriment of Petitioner, which have not been in accordance with federal laws or regulations. In spite of the evidence and arguments presented to the court on specific errors of law committed by the Respondent, the Eleventh Circuit sanctioned the continued departure from law practiced by Respondent. These issues were raised in Petitioner's Post Hearing Brief to the Administrative Law Judge on pages 38-45 (App. 4a-10a); Petitioner's Initial Brief to the United States Court of Appeals for the Eleventh Circuit on pages 17-20 and pages 31-40 (App. 11a-15a, 15a-24a); and in Petitioner's Suggestion for Rehearing En Banc, pages 5-11 (App. 30a-37a).

CONCLUSION

Petitioner understands that a writ to invoke the certiorari jurisdiction of this Court is designed to be short and concise and without unnecessary detail as provided in Supreme Court Rule 14. In deference to this rule, Petitioner's Writ for Certiorari addressed the basis for the request without providing cumbersome details. If this writ is accepted, Petitioner's issues will be briefed in meticulous detail as the legal basis underlying this request are of the utmost importance.

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM FLORIDA'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

HISTORICAL BACKGROUND

USDOL is the administrator under the JTPA of federal grant funds for the training and re-employment of low-income workers and other individuals facing serious barriers to employment. During the seven years immediately following the enactment of the JTPA, which period is covered by this audit, USDOL implemented regulations which gave deference to State policies. This deference recognized Congress's unequivocal intent for the Governor to exercise the primary supervisory role over the state's job training program. During this period, policy decisions rendered by Governors went undisturbed, unless found to be inconsistent with the JTPA and its regulations. However, with the audit in question the Grant Officer abandoned the longstanding deference previously accorded the Governor and violated the fundamental principles of federalism upon which the JTPA was premised.

The 97th Congress enacted the JTPA to replace the Comprehensive Employment and Training Act (CETA), a federally sponsored job training program, which had proven less than extravagantly successful; "informed opinion seems to suggest that *excessive federal involvement* was partially to blame for CETA's problems." *Hernandez-Colon v. Secretary of Labor,* 835 F.2d 958 (1st. Cir. 1988). With the failures of CETA in focus, Congress designed the JTPA and opined that the new law would "substitute state management for federal management of the job training function, recognize the role of the state in all local programs, and end the excessive involvement of the federal government." *Id.* at 961, N.3, citing S. Rep. No. 469, 97th Cong. 2d Sess. 2, reprinted in 1982, U.S. Code Cong. and Admin. News 2636, 2637.

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Congress was also guided by four basis principles it deemed essential for an effective job training program, which required the Governor and private sector involvement, with emphasis on performance results.[6]

In recognition of these principles, see note 6, which clearly supplanted the federal government from administration of the JTPA and gave the primary responsibility to the Governor, regulations were enacted at 20 C.F.R. parts 626 through 638. More specifically, the provisions at 20 C.F.R. § 627.1 embodies the fundamental notions of federalism[7] Congress sought to

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6. The pertinent language of the principles held: First, the new legislation must provide for the involvement of the private sector in the design and administration of training programs. Under the current CETA system, business involvement has been limited to Title VII programs, and there is no requirement for the involvement of the private sector in all aspects of the program. . . .

Second, job training legislation must recognize the true principles of *federalism. . . . The new legislation will recognize the role of the state in all local programs and end the excessive involvement of the federal government.*

Third, job training legislation must truly be a *training legislation* and not an *income maintenance program. . . .*

Fourth, the legislation must insist on performance. . . . The new legislation will provide standards for judging the programs by what they accomplish-by whether those trained are hired and earn more as a result of training. It will end federal involvement with the process of how people are to be trained. It will provide for measurement of the outcomes and remove the Federal government from involvement in the details of program operations. (emphasis added). S. Rep. No. 469, supra, at 3, 1982 U.S. Code Cong. and Admin. News at 2637-2638.

7. The Senate in discussing its notion of federalism, provided in relevant (Cont'd)

embrace in the JTPA, and required the Secretary and Governor to sign an agreement to include the following provision:

> "guidelines interpretations and definitions adopted by the Governor shall, to the extent that they are consistent with the Act and applicable rules and regulations, be accepted by the Secretary."

Clearly, this provision captured the Congressional intent under lying the JTPA to respect and defer to the States autonomy, and reinforced the system of dual sovereignty between the states and the national government, established by the U.S. Constitution.

* * *

(Cont'd)
part: Under the legislation reported by the Committee, the state will be the key actor in the approval of job training programs. First, *and perhaps most important, the state will define the structure of the delivery system through the determination of service delivery areas.* This critical determination will be done by the Governor after receiving the proposals of local government and business officials. The Governor will also be in charge of approving local developed plans, of monitoring and auditing the performance of plans, of insuring fiscal responsibility and compliance with Federal mandates as well as of running statewide programs. *In short, the basic supervisory role previously performed by the federal government will now be turned over to the state, the place where it really belongs.* (emphasis added) *Id.* at 2638.

Appendix A

V.

USDOL HAS MISCONSTRUED THE LAW AND VIOLATED ITS OWN REGULATIONS

USDOL has violated it own regulations in advancing this audit. The attempt to override the authority of the Governor is in direct conflict with 20 C.F.R. § 627.1. Under this provision the Secretary of USDOL agreed to defer to the Governors guidelines, interpretations, and definitions if not inconsistent with the applicable rules and regulations. (RX-l-p. 97).

It is well settled in the law that agencies are required to follow their own regulations. *Chicano Educ. and Manpower Sev. v. Department of Labor,* 909 F.2d 1320, 1327 (9th Cir. 1990); citing *Service v. Dulles,* 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed 2d 1403 (1957); *Memorial, Inc. v. Harris,* 655 F.2d 905, 910-11 N. 14 (9th Cir. 1980). "Congress recognizes that it can only legislate, not administer, so it necessarily relies on agency action to make "common sense" responses to problems that arise during implementation, so long as those responses are not inconsistent with Congressional intent. *Cablevision System v. Motion Picture Assoc.,* 836 F.2d 599 (C.D. Cir. 1988). Even if the action of an agency is discretionary by statute, an agency's own regulations must be complied with by the agency. *California Human Development Corp. v. Brock,* 762 F.2d 1044, 1049 (D.C. Cir. 1985).

As the Governor of Florida and USDOL Secretary Donovan signed the agreement in 1983 such agreement binds USDOL to accept the guidance given to the Florida job training community by the Governor, unless inconsistent with the law and regulations. The record clearly established that USDOL did not

articulate any rule or regulation which is inconsistent with the policy decisions rendered by the Governor.

Secondly, USDOL has violated the spirit of its regulation at 20 C.F.R. § 629.35(e), which addresses the minimum period of time JTPA records are to be maintained. The record retention provision provides in part:

> . . . For funds allotted to a State for any program year, records must be retained for two years following the date on which the annual expenditure report containing the final expenditures charged to such program year's allotment is submitted to the Department of Labor. Records for nonexpendable properly shall be retained for a period of three years after final disposition of the property.

This provision requires the Governor to ensure that records pertinent to JTPA grants are retained a maximum of three years, unless an audit or litigation has commenced, then records must be maintained until matters are resolved.

By the terms of its own regulations, USDOL did not envision an indefinite JTPA and WPA record retention period. Yet, the Grant Officer in total disregard of USDOL's own regulation and of Florida's reliance on the regulation, disallowed costs from program years 1983 through 1989, by simply listing contract numbers from Florida's profits and loss ledger. This regulation does not accord any discretion to USDOL to shift its retention requirements in a manner detrimental to Florida. Such sweeping disregard for it own regulation is not supported by the law or the facts.

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When this audit was performed, contractual records for program years 1983 through 1985 had been destroyed. This fact is attested by the uncontradicted sworn affidavits of Jerome Jones and Jerome Dilworth, previously filed in this cause.[17] Even though Florida's Auditor General expressed some concern for Florida's procurement system involving ESJS, the concerns did not rise to the level of audit or litigation for the purposes of record retention in 20 C.F.R. 629.35(e). As no other audits or litigation existed which required the maintenance of records beyond the minimum retention period, and USDOL did not instruct Florida to maintain the records beyond the minimum period, any disallowed cost associated with these years should be summarily dismissed.

Additionally, the Grant Officer has misapplied the provisions of Section 161(b) of the JTPA and Section (5)(c) of the Wagner-Peyser Act, as amended in claiming that the three year window of availability for use of the funds has expired. The Governor directed that excess revenues loose their program identity and may be used for any governmental purpose, consistent with the earning entities responsibility. (RX-1-Pgs. 32, 34). These directions were provided during a period when USDOL chose not to regulate in the area.

Likewise, contrary to the Grant Officer's position, the disposition of the funds in question are not governed by Section 161(b) of the JTPA, or by Section 5(c) of the Wagner Peyser Act, as amended. Those sections provide a three year period for the expenditure of obligated funds. This three year window of

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17. See Florida's response to Grant officers motion for orders finding that evidence not produced would have been adverse to complainant dated September 3, 1993.

availability, is inapplicable because the profits in question were not obligated funds. On March 13, 1989, USDOL published an interpretative regulation in Federal Register, Vol. 54 No. 47, effective July 1, 1989, which provides that profits generated in excess of cost maintain their federal identity and must be used for program purposes; however, the Grant Officer concedes that profits properly earned prior to July 1, 1989 are not bound by this interpretation or by the three window of availability.[18] (CX-p. 103).

Florida will respect and follow this provision; however, to the extent USDOL did not regulate the area prior to July 1, 1989, the Governor's policy controls.

VI.

USDOL HAS VIOLATED THE ADMINISTRATIVE PROCEDURE ACT

USDOL has failed to adhere to the requirements of the Administrative Procedures Act (APA), 5 U.S.C.A. § 552, which requires each agency and authority of the United States to publish rules in the Federal Register for public guidance. The provision requires in relevant part:

> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —
>
> (D) substantive rules of general applicability

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18. The law regarding unlawful retroactive application was discussed length in Florida Motion For Summary Judgment (CX-25).

> adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by he agency; . . .

The law further provides:

> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to report to, or be adversely affected by a matter required to be published in the Federal Register and not so published.

It is fundamental that administrative actions taken pursuant to unpublished rules will not be allowed to stand against persons adversely affected thereby. *Coby Transfer and Storage v. Froehlke,* 480 F.2d 498 (4th Cir. 1973). Except however, if actual and timely notice of the terms of the procedures to be followed is given, agencies are exempt from this principle. *Northern California Power v. Morton,* 396 F. Supp. 1187 (1975).

By its own admission, USDOL's first official interpretation of the utilization of fixed unit price performance based contracts by governmental entities was the interpretative regulation, effective July 1, 1989. Rules concerning conflicts of interest have not been published.

Edward Donahue testified that concerns were raised by USDOL in Employment and Training Guidance Letter 3-87, dated November 18, 1987, on the possible misapplication of fixed unit price performance based contracts; however, the letter did not prohibit the use of such contracts. (CX-1-Exhibit E).

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Additionally USDOL's solicitation for comments in the Federal Register, Vol. 53, No. 48, March 11, 1988, on the generation of profits utilizing fixed unit price performance based contracts did not restrict the use of these type contracts by governmental entities nor did it prohibit or restrict the use of profits lawfully earned. (CX-1-pgs. 61-63). USDOL's concerns do not constitute a rule or regulation such that Florida should be penalized as the Grant Officer seeks in this matter Florida was not provided actual or timely notice of any prohibitions in its contracting methods and should not be sanctioned for USDOL's failure to so provide as required by the APA.

VII.

THE GRANT OFFICER IS NOT EMPOWERED TO ABROGATE THE GOVERNOR'S DECISION, ABSENT SPECIFIC STATUTORY AUTHORITY

The findings of the Grant Officer epitomize the type federal intervention in Florida's job training program which Congress disavowed. The legislative history of the JTPA does not suggest any Congressional intent for the Grant Officer to usurp the longstanding discretion accorded to States and the Governor.

The Supreme Court recently observed: "The Constitution created a Federal Government of limited powers." The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our Constitutional system." *Gregory v. Ashcroft,* 111 S.Ct. 2395 (1991). The Supreme court has further observed: "If Congress intends to alter the usual constitutional balance between the

States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft,* supra, quoting *Atascadeso State Hospital v. Scanlon,* 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed. 2d 171 (1985). With the JTPA legislation, Congress clearly embraced the need to reinforce the system of dual sovereignty established by the Constitution, and adopted a balance of power between the states and the Federal Government. See note 6, supra. It has been consistently recognized by the courts that congressional intent in enacting a statute will indicate whether a federal statute preempts state law. *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). While legislative intent may be manifested in several ways, chief among the indicators is where Congress has legislated so comprehensively and has left no room for supplementary state legislation. *R.J. Reynolds Tobacco Co. v. Durham County, N.C.,* 107 S. Ct. 499 (1986).

Congress did not express or imply pre-emption in the JTPA. Consequently, this matter does not involve conflicting laws or regulations nor does it involve an area where Congress has regulated the field. On the contrary, we have an attempt by the Grant Officer to usurp decisions made by the Governor, without expressed or implied statutory or regulatory authority to do so, on any issue he has raised. Absent such authority, the Grant Officer's findings constitute a violation of the states sovereignty, pursuant to the Tenth Amendment, and a violation of the congressional intent underlying the JTPA.

* * *

APPENDIX B — EXCERPTS FROM INITIAL BRIEF OF APPELLANT, STATE OF FLORIDA FILED IN THE ELEVENTH CIRCUIT

* * *

a. The Grant Officer Did Not Have Sufficient Factual Grounds or Legal Basis Upon Which to Question the Validity of the Contracts.

1. THE INTRODUCTION OF ONE CONTRACT OF 250 IN QUESTION IS STATICALLY INSUFFICIENT TO MEET BURDEN OF PROOF

The findings of the ALJ as to the insufficiency of evidence clearly explicate the correct ruling on this point. In relevant part the order reads:

> Pursuant to 20 C.F.R. section 629.57(i)(APX-15) USDOL has the initial burden of production in this case. This means that USDOL must put forth evidence sufficient to establish a *prima facie* case in support of the alleged JTPA violations. This burden requires USDOL to produce relevant evidence "sufficient to enable a reasonable person to draw for it the inference sought to be established." McCormick, *Evidence*, 789-790 (2d ed. 1972). Once USDOL has met its *prima facie* burden, the burden of production then shifts to DLES to show compliance with the pertinent provisions of the JTPA. *Maine v. United States Dept. of Labor*, 669 F.2d 827 (1st Cir. 1982). Nonetheless, the ultimate burden of persuasion rests with DLES

throughout the entire case. 20 C.F.R. section 629.57(i). The burden of persuasion never shifts to USDOL.

With respect to the first issue of the case, whether DLES inappropriately charged profits to the training cost category, 20 C.F.R. section 629.38(e)(2) provides the relevant law. During the period of the audit, 20 C.F.R. section 629.38(e)(2) set forth three requirements to be met before a cost may be billed entirely to the training category. In such cases, the agreement between the program recipient and the service provider must be for training, must be fixed unit price, and must stipulate "that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant. . . ." 20 C.F.R. section 629.38(e)(2) (1988).

In support of its contention that DLES violated this regulation, USDOL offers only one contract between DLES and Manasota Industry Council, Inc. (Manasota). The Manasota contract does appear to violate the provisions of 20 C.F.R. section 629.38(e)(2) in that the contract contains both fixed unit price characteristics and cost reimbursement characteristics. (USX-3 at 6; Tr. at 202.) However, USDOL *produces the Manasota contract* alone as evidence that all of the *250* contracts that were the subject of the audit

> violated 20 C.F.R. 629.38(e)(2) as well. In fact, the auditor himself admitted that he never even examined the remaining 249 contracts for violations of the JTPA regulations. (TR. at 218, 220.) The fact that one contract out of 250 violated 20 C.F.R. Section 629.38(e)(2) does not allow a reasonable person to infer that all 250 contracts violated the same provision without any further evidence. Therefore, I find that USDOL *has failed to meet its initial burden of production* to substantiate *its claim that* DLES violated 20 C.F.R. section 629.38(e)(2). Without offering further evidence, USDOL cannot expect to overcome even the relatively week burden of establishing a *prima facie* JTPA violation solely on the basis of the Manasota contract. (RDoc.65, pp. 5 & 6.)

The evidence conclusively established that the Grant Officer did not have sufficient factual grounds upon which to question the validity of the contracts. Jimmy Woodward, who supervised and conducted the audit on behalf of the USDOL-OIG, testified without contradiction that the audit team did not look at individual contracts to determine compliance with 20 C.F.R. § 629.38(e)(2) (APX-7). (RDoc. 41, p. 220.) The deposition of Edward Donahue, USDOL Grants and Compliance Specialist, (RDoc.41, p. 183) provides further corroboration that the contracts were not reviewed *before* or *after* the costs associated with them were disallowed. (RDoc.42, FLX-1-pp. 90, 91.) When questioned at the hearing on whether Florida was given notice in the USDOL-OIG Report of any alleged improprieties in 250 contracts, Mr. Donahue testified as follows:

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> Donahue: I indicated earlier that it was an independent decision of the Grant Officer to raise the question of whether or not the contracts met the requirements of 629.38(e)(2). It was not an issue raised by the OIG auditors. (RDoc. 41, p. 189).

Likewise, Mr. Donahue testified that he did not have any information on what contracts did not meet the requirements of 629.38(e)(2) because the contracts were not examined. (RDoc. 42, FLX-1-p. 91.)

In *Northport Health Services v. NLRB*, 961 F.2d 1547 (11th Cir. 1992), the issue of substantial evidence necessary to support an administrative order was addressed. Therein, the Eleventh Circuit reversed a decision rendered by the NLRB and opined that agencies cannot rest conclusions on a *scintilla of evidence* or even on any amount of evidence that is less than substantial, nor can decisions be based on facts that are not supported by the record. *Id.* at 1550, citing *Universal Camera Co. v. NLRB*, 340 U.S. 474 477, 71 S. Ct. 456, 459, 95 L.Ed. 456 (1951) quoting, *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938).

In this case, the Grant Officer has not presented even a scintilla of evidence which under *Northport, supra*, would still be insufficient to support his sweeping disallowance. There is no rational connection between reviewing one contract executed in 1983 between one of 24 SDAs and one out of approximately 80 ESJS offices and summarily disallowing costs related to all contracts involving the ESJS offices for seven program years, especially when none of the contracts was reviewed. As recognized by the Supreme Court in *Consolidated Edison Co.*

v. NLRB, supra, the basis in evidence must have a rational probative value, mere uncorroborated hearsay or rumor does not constitute substantial evidence. *Id.* at 217. The Grant Officer can hardly substantiate allegations when, admittedly, the contracts were not reviewed for adherence to 20 C.F.R. 629.38(e)(2).

* * *

II.

THE RECORD DOES NOT CONTAIN COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE CONCLUSION OF THE AGENCY HEAD THAT THE REALIZATION OF EARNINGS BY THE STATE AGENCY RESULTED FROM THE LACK OF SOUND MANAGEMENT PRACTICES AND FROM CHARGES TO THE FEDERAL GRANT WHICH WERE NOT NECESSARY AND REASONABLE FOR PROPER AND EFFICIENT ADMINISTRATION OF THE GRANT PROGRAM.

As a legal basis for finding that profits indicate that costs charged to the contract were unreasonable, the USDOL looked to OMB Circular A-87 and 20 C.F.R. § 629.37 (a) (APX-6). Even before the hearing, the USDOL had conceded that the generation of profits during the period of the audit in question did not violate JTPA or its regulations (see RDoc. 46, USX-15; and RDOC. 47 ALJX 17, respectively). So too did the parties stipulate (see RDoc. 65, Stip. 10). At the hearing Mr. Woodward testified that profits were not illegal during the period of the audit (RDoc. 41, TR p. 245), and Edward Donahue corroborated this position in his deposition, testifying that revenues properly

earned prior to July 1, 1989, were not violative of the laws or regulations. (RDoc. 42, FLX-1, p. 38, line 7 through p. 39, line 5.)

a. The Record Lacks Sufficient Evidentiary Basis to Support Finding That Costs Charged to Grant Were Not Reasonable and Necessary.

The Secretary has found that the level of profits involved violated 20 C.F.R. § 629.37(a) (see APX.6).[5] That rule is a catch-all regulation with the basic requirement that all cost be "necessary and reasonable for proper and efficient administration of the [JTPA] program. . . ."

The Secretary maintains that the obligation to produce substantial factual evidence was met by the information contained in JTPA Revenue Account G-3880 (RDoc. 71, pp. 7 & 8).

The Secretary concluded that the profits indicate costs were charged to the contract which were not necessary. The relevant facts as garnered by the Secretary are:

> . . . The Detail Summary of the account lists each subgrant by Program Year and JTPA

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5. Section 629.37 Allowable Costs. (a) General. To be allowable, a cost must be necessary and reasonable for proper and efficient administration of the program, be allocable thereto under these principles, and, except as provided herein, not be a general expense required to carry out the overall responsibilities of the Governor or subrecipient. Costs charged to the program shall be consistent with those normally allowed in like circumstances in non-federally sponsored activities and with applicable State and local law, rules or regulations, as determined by the Governor.

> title, and indicates that 160, or 65%, of the contracts produced a high level of profits to make up the total losses incurred by the remaining 35% of the contracts and still show an excess net of profit of almost $1 million. (RDoc. 71, p.7).

The facts contained in the Secretary's analysis of JTPA Revenue Account are not part of the record. However, the record does show the Grant Officer and the Audit Supervisor for the USDOL-OGI admitted that the contracts associated with the $961,003.00 being disallowed, were not reviewed or analyzed by the auditors during the audit or by the Grant Officer during his review of the audit report or during his decision to disallow the costs (RDoc. 41, p. 220). Mr. Woodward admitted that the purpose of the audit was to find the source of the $800,000 payment. He related that during the audit, the audit team focused primarily on the financial records and funding sources. He further testified that the auditors did not look at individual contracts to determine, if they adhered to federal regulations for fixed unit price performance based contracts. (RDoc. 41, p. 220.) In fact, in a deposition on behalf of the Grant Officer, Mr. Donahue testified that the Grant Officer could not provide any information to Florida on which of the 250 contracts violated various aspects of 20 C.F.R. § 629.38(e)(2) (APX-7), in that the contracts were not reviewed by the Grant Officer. (RDoc. 42, FLX-1, p. 91.)

According to the Secretary, OMB Circular A-87 provides the objective criteria for determining that the profits were not legal. In Federal Register, Vol. 53. No. 48, p. 7992, March 11, 1988, USDOL indicated that Office of Management and Budget officials involved in the initial drafting of CMB-A-87 advised

ETA that the circular did not anticipate or address the question of profits by state or local governments. (RDoc. 28, Tab 5 at p. 7992, bottom of middle column, APX-19.) Mr. Donahue conceded in his deposition that the principles of OMB Circular A-87 do not apply to fixed unit price performance based contracts (R.Doc. 42, FLX-1-pp. 64-66).

Nevertheless, the Secretary determined that the profits were in violation OMB A-87 for two reasons: 1) the provision provides that profits are not intended, and 2) the contracts in question were not negotiated at "arms length," and, therefore, were not reasonable. Neither of the reasons is supported by substantial evidence; therefore, the resulting conclusions are arbitrary and capricious, as shown by the following discussion.

b. The Record Does Not Contain Any Competent Proof That OMB Circular A-87 Proscribes the Realization of Profits By State Agencies.

According to the Secretary, the *Purpose and Scone* section of OMB A-87 clearly provides that state agencies are not to realize profits from federal grants (RDoc. 71, p. 9). That section of the circular reads:

> 1. *OBJECTIVES.* This attachment sets forth principles for determining the allowable costs incurred by State . . . governments under grants . . . with the Federal government. . . . The principles are for the purposes of cost determination. . . . They are designed to provide that federally-assisted programs bear their fair share of costs recognized under these principles, except where restricted or

prohibited by law. No provision for profit or increment above cost is intended.

The Secretary has determined that the sentence, "No provision for profit or increment above cost is intended [.]" proscribes profits. According to the Secretary, the word "intended" is a "form of the noun intention." (RDoc. 71, p.8) The basis for this conclusion is not stated. However, the plain reading of the provision reveals "is intended" to be a verb, passive voice — a form of the verb "be" plus a past participle. Perrin, Porter G., George H. Smith & Jim W. Corder, *Handbook of Current English*, 3d. Edition, Scott, Foresman and Company, 1968. Assuming that the word "intended" is the past participle of the verb intend, it means "to have in mind as a purpose or goal, to design for a specific use; signify, mean, to direct the mind on." *Webster's Ninth New Collegiate Dictionary Merrian*, Webster Inc., Publishers (1991). The definition found in *Black's Law Dictionary*, Sixth Edition, West Publishing Co., St. Paul, Minn. (1990), reads: "To design, resolve, propose. To plan for and/or expect a certain result. To apply a rule or law in the nature of a presumption, to discern and follow the probabilities of like cases. See also intent." Thus, "is intended" could be exactly what the Secretary says it is not: precatory. It can be used to "propose."

The Secretary's order interprets the word "intended," as used in OMB Circular A-87. The Office of Management and Budget (OMB) issues the circulares describing the principles to be applied in assessing costs charged to various grants. The OMB is an agency separate from the USDOL. See 31 U.S.C.A. § 501 *et seq.* and 42 U.S.C.A. § 12651 *et seq.* The interpretations of the OMB circulares rendered by USDOL are not entitled to any deference. Deference is accorded an agency's interpretation of

its own rule, not that of another agency. See *Wiggins Bros., Inc. v. Department of Energy*, 667 F.2d 77 (Temp. Emergency Ct. of Appeals 1981), cert. denied 102 S. Ct. 1749, 456 U.S. 905, 72 L. Ed. 2d 161, on remand 548 F. Supp. 547.

c. OMB Circular A-87 Does Not Provide Any Objective Criteria Upon Which to Determine Whether Costs Charge to Federal Grants Were "Necessary and Reasonable."

The Secretary found that OMB Circular A-87 provided the objective criteria necessary to determine whether the costs were "necessary and reasonable."[6] (RDoc. 71, p. 11). The provision reads:

> 2. *Reasonable costs*
>
> A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness of specific costs must be scrutinized with particular care in connection with governmental units or subdivisions thereof which receive the preponderance of their support from awards made by Federal agencies. In determining reasonableness of a given cost, consideration shall be given to:
>
> * * *

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6. It was necessary to go outside of JTPA for objective criteria in that, as the parties stipulated, the USDOL did not issue any rules or regulations as guidance on contract negotiations. (RDOc. 65, p. 2, Stip. 13.)

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> b. The restraints or requirements imposed by such factors as sound business practices, arms length bargaining, Federal, *State* and other laws and regulations, and terms and conditions of the Federal awards. (Emphasis supplied.)
>
> * * *
>
> d. Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large and the Federal Government.
> OMB Circular A-87, Attachment A, Part C.2., (RDoc. 45, p. 86).

According to the Secretary, the costs could not have been reasonable and necessary in that the contracts were not negotiated at arms length (RDoc. 71, p. 11). At the heart of this controversy is the intra-agency contracting. The Bureau of Job Training ("BJT") and the Florida Employment Service ("FES") are units of the Division of Labor, Employment and Training ("DLET"), which is a division of the Department of Labor and Employment Security ("DLES"). DLET is administratively responsible for JTPA. (RDoc. 45, p.20.) The Florida Employment Service local offices entered into approximately 250 fixed unit price, performance-based contracts with BJT and various JTPA Service Delivery Area (SDA) subgrantees which were monitored by DLET. (RDoc. 45, pp. 70-75.)

The parties have stipulated (RDoc. 65, p. 2, Stip 13.) that during program years 1984 to 1989, there was no language in

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OMB Circular A-87 that specifically addressed arms length negotiation. In fact, while the specific language cited in the order of the Secretary lists arms length bargaining as an important consideration in determining the reasonableness of a cost under the JTPA, this language did not appear in the Federal Register until October 1988. 53 Fed. Reg. 40352, 40354 (1988) (*proposed* October 14, 1988). (RDoc. 28, Tab 2 at 40352, last column, APX-22.) Thus, although there was a general requirement that all costs be "reasonable" during the period of the audit, there existed no criteria for determining what constituted a "reasonable" cost. The *proposed* OMB Circular A-87 issued in October 1988 can not be used to provide an objective basis for finding that DLES' contracting practices during program years in question violated the JTPA at the time of the audit. (ALJ opinion, RDoc. 67, p. 9.)

As stated in the decision issued by the ALJ:

> . . . According to the Supreme Court, "[retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In fact, the current law prohibits retroactive application of federal statute and administrative rules and regulations unless the plain language of the statute or regulation so dictates. *Id.* Where no such express language exists, retroactivity is presumptively barred unless clear congressional intent commands otherwise. *Landaraf v. USI Film Prods.*, 114 S.Ct. 1483 (1994) .
>
> Finding no express language in the JTPA or the accompanying regulations to support

> their retroactive application, I must conclude that there is no basis for enforcing the regulations on which USDOL bases its findings retrospectively. Likewise, I find no legislative intent to grant authority to USDOL to enforce rules retroactively under the JTPA. I also recognize that, "[e]ven where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant. *Bowen*, 488 U.S. at 208-209.
>
> In sum, since I find no specific violation of the JTPA or the accompanying regulations as set forth during the period of the audit, I find that DLES need not return to USDOL net profits realized from contracts with ESJS offices during the period covering program years 1984 through 1989. Accordingly, the Grant Officer must be reversed. [Footnote omitted.] (RDoc. 65, pp. 9 & 10.)

The order of the Secretary does not dispute the facts as rendered by the ALJ regarding OMB Circular A-87. Rather, the Secretary maintains that, "The lack of publication of a specific phrase doesn't negate the principle." (RDoc. 71, p. 10.) According to the Secretary, "[t]he enmeshed relationships between the parties to the Florida Job Services contracts signal a potential conflict of interest." (Emphasis added. RDoc. 71, p. 10.) Based upon this potential conflict of interest, the Secretary found that there was a contravention of "sound management practices."

There is no evidence in the record to support such a finding. Mr. Woodward testified that the audit team did not look at any contracts and determine them to be less than arms length transactions, nor were there factual allegations of improprieties or conflicts on the part of Florida when the USDOL-OIG Report was issued. (RDoc. 41, TR-pp. 247-257). USDOL further admitted that the auditors did not consider demonstrated performance, the populations served or the services provided, and they were not familiar with the criteria Florida utilized to award JTPA contracts nor did they review such procedures. (RDoc. 42, FLX-4 pp. 16-18.)

III.

FLORIDA PRESENTED CREDIBLE EVIDENCE TO SUPPORT THE LEGALITY OF ITS CONTRACTS.

In spite of the foregoing, the Secretary contends that the Grant Officer having met his burden of production, the burden or persuasion devolved upon Florida to show that the balance of the contracts (i.e. 249) entered into between DLET and the Service Delivery Areas subgrantees with the local Florida Employment Service offices met regulatory requirement governing fixed unit price performance based contracts (FUPPB) and are in compliance with 20 C.F.R. 629.38 (e)(2). (RDoc.71, p. 7.) The Secretary found that the State failed to do so. However, the record belies that conclusion.

a. The Intra-agency Contracts Were Negotiated at Arms Length.

The Secretary concedes that the fixed unit price, performance based contracts were permissible during the Programs Years in question (RDoc. 71, p. 9 & 11). The parties

so stipulated (see RDoc. 65, p. 2 Stipulation 9.) and Mr. Woodward so testified at trial (RDoc. 41, pp. 249-250). Again using the "arms length standard," the Secretary, nevertheless, concludes that where the contracting parties are organizationally linked, there has to be a punctilious showing that the contracts were rigorously negotiated. This focuses on the general method of contracting employed by the State.

Again, Mr. Woodward concedes that he did not examine the individual contracts within his audit in order to determine that the fixed unit price performance-based contracts were not negotiated at arms length. (RDoc. 41, pp. 218, 220, 230.) Likewise, Mr. Woodward did not look at the criteria according to which DLES awarded JTPA contracts. (RDoc. 41, p. 248.) Rather, Mr. Woodward examined the general scheme for issuing JTPA contracts in the State of Florida. (RDoc. 41, pp. 222, 248.) In other words, Mr. Woodward's audit focused primarily on the parties involved in the contracting, as opposed to the contracts themselves. Based on this, Woodward concluded that the contracts in question had the "appearance" of not having been negotiated at arms length. (RDoc. 41, p. 250.)

A review of the records reveals that Florida presented unrefuted testimony at the hearing concerning its contracting procedures, which demonstrated the extra precaution initiated by the Governor to assure open and free competition. (RDoc. 61, pp. 2430.) The evidence established that the Governor made an informed decision to require Employment Service offices to compete for contracts to provide JTPA and WPA services, even though section 287.057(f)(13), Florida Statutes, exempts governmental entities from the Florida law governing the competitive procurement selection process. (RDoc. 44, FIX-36.) Thereby, avoiding any conflict of interest, as well as any appearance of impropriety or favoritism to the ESJS.

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The historical development of the Job Training Partnership Act is integral to fully understand the authority accorded the State by JTPA in matters of contracting.

1. *HISTORICAL PERSPECTIVE*

The 97th Congress enacted the JTPA to replace the Comprehensive Employment and Training Act, a federally sponsored job training program, which had proven less than extravagantly successful; "informed opinion seems to suggest that *excessive federal involvement* was partially to blame for CETA's problems." *Hernandez-Colon v. Secretary of Labor*, 835 F.2d 958 (1st. Cir. 1988). With the failures of CETA in focus, Congress designed the JTPA and opined that the law would "substitute state management for federal management of the job training function, recognize the role of the state in all local programs, and end the excessive involvement of the federal government." *Id.* at 961, note 3, citing S. Rep. No. 469, 97th cong. 2d Ses. 2, reprinted in 1982, U.S. Code Cong. and Admin. News 2636, 2637.

Congress was also guided by four basic principles it deemed essential for an effective job training program, which required the Governor and private sector involvement, with emphasis on performance results.[7]

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7. The pertinent language of the principles held: First, the new legislation must provide for the involvement of the private sector in the design and administration of training programs . . .

Second, job training legislation must recognize the true principles of *federalism. . . . The new legislation will recognize the role of the state in all local programs and end the excessive involvement of the federal government.* (Cont'd)

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In recognition of these principles, see note 7 herein, which clearly supplanted the federal government from administration of the JTPA and gave the primary responsibility to the Governor, regulations were enacted at 20 C.F.R. parts 626 through 638. More specifically, the provision at 20 C.F.R. 627.1 embodies the fundamental notions of federalism[8] Congress sought to embrace in the JTPA, and required the Secretary and Governor to sign an agreement to include the following provision:

> . . . guidelines interpretations and definitions adopted by the Governor shall, to the extent that they are consistent with the Act and applicable rules and regulations, be accepted by the Secretary. (20 C.F.R. 627.1.)

(Cont'd)

Third, job training legislation must truly be a *training legislation* and not an *income maintenance program. . . .*

Fourth, the legislation must insist on performance. . . . It will *end federal involvement* with the process of how people are to be trained. It will provide for measurement of the outcomes and *remove the Federal government* from involvement in the details of program operations. (Emphasis added.) S. Rep. No. 469, supra, at 3, 1982 U.S. Code Cong. and Admin. News at 2637-2638.

8. The Senate in discussing its notion of federalism, provided in relevant part: Under the legislation reported by the Committee, the state will be the key actor in the approval of job training programs. First, *and perhaps most important, the state will define the structure of the delivery system through the determination of service delivery areas.* This critical determination will be done by *the Governor* after receiving the proposals of local government and business officials. The *Governor* will also be in charge of approving local developed plans, of monitoring and auditing the performance of plans, of insuring fiscal responsibility and compliance with Federal mandates as well as of running statewide programs. *In short, the basic supervisory role previously performed by the federal government will now be turned over to the state, the place where it really belongs.* (Emphasis added, *Id.* at 2638.)

Clearly, this provision captured the Congressional intent underlying the JTPA to respect and defer to the State's autonomy, and reinforced the system of dual sovereignty between the states and the national government, as established by the U.S. Constitution.

* * *

APPENDIX C — EXCERPTS FROM SUGGESTION OF REHEARING EN BANC FILED IN THE ELEVENTH CIRCUIT

* * *

ARGUMENT AND AUTHORITIES

INTRODUCTION

Florida sets forth the following issues for the Court's review and contends that they are worthy of en banc consideration for several reasons.

The matter before this court involves an understanding and interpretation of the JTPA and its regulations. While the law and its regulations are complex, Congress was emphatically clear on its desire through the legislation to recognize the role of the state in all local programs and to end the excessive involvement of the federal government. Legislative History of the JTPA at S. Rep. No. 469, 97th Cong. 2d Sess. 2 (1982), U.S. Code Cong. & Admin. News 1982, 2637.

The legislative history of the JTPA also reflects an unequivocal intent by Congress to achieve several goals: (1) to reinforce the system of dual sovereignty established by the Constitution; (2) to supplant the federal government from administration of the JTPA; (3) and to give the Governors of each State primary responsibility over state programs.

The Secretary's decisions in this case on matters of law are an attempt to usurp decisions made by the Governor, without expressed or implied statutory or regulatory authority to do so. The legislative history of the JTPA clearly indicate that the Secretary's intervention epitomizes the type federal intervention which Congress disavowed.

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While this court's order found that there was substantial evidence in the record to support the Secretary's decision, this court failed to review the legality and underlying authority of the Secretary to pre-empt the Governor regarding the issues discussed below.

Appellate Courts in several circuits have clearly recognized the authority of the Secretary to recover misspent funds under the JTPA. However, whether the Secretary has authority to recover funds that are not misspent, in contravention of the authority specifically accorded to the Governor pursuant to the JTPA, presents a legal issue of first impression and one of great importance to Florida and the job training community throughout this country.

I.

WHETHER THIS COURT HAS PROPERLY ACCORDED DECISIONS OF THE SUPREME COURT AND PRECEDENT OF THIS CIRCUIT WHICH HOLD THAT ADMINISTRATIVE DECISIONS BASED ON INCORRECT LEGAL PRINCIPLES CANNOT PROPERLY STAND; REVIEWING COURTS HAVE AUTHORITY AND RESPONSIBILITY TO CORRECT ERRORS OF LAW MADE BY AN ADMINISTRATIVE AGENCY DURING ITS DECISION MAKING PROCESS.

The Supreme Court of the United States has consistently emphasized the remedial role of a reviewing court in instances where administrative agencies have reached findings and conclusions found not to be in accordance with the law. In elaborating upon the responsibility of the reviewing court in that instance, the Supreme Court established the principle that when

an administrative agency has made an error of law, the Court has a duty to correct the error of law committed by that body. *N.L.R.B. v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & Gen. Pipefitters of New York, Local Union No. 38*, 429 U.S. 507, 97 S. Ct. 891, 51 L. Ed. 2d 1 (1977), quoting *I.C.C. v. Clyde S.S. Co.*, 181 U.S. 29, 21 S. Ct. 512, 45 L. Ed. 729 (1901). The Eleventh Circuit has followed this principle and echoed that it will not allow misconceptions in law that arise during the agency decision-making process to stand but rather will exercise authority and responsibility to correct those errors. *Florida Department of Labor v. U.S. Department of Labor,* 893 F. 2d 1319 (11th Cir. 1990). In that case this Court reviewed a Final Decision and Order of the Secretary of USDOL, which imposed prejudgment interest against the Florida Department of Labor, and considered whether the Secretary had authority to collect interest from States. While this court clearly recognized its independent obligation to review questions of law it also observed that an order cannot stand where the agency has misapplied the law whether or not either party raised the issue below. *Id.* at 1322. Accord also, *Pollgreen v. Morris,* 770 F. 2d 1536 (11th Cir. 1985), where this court reversed a decision of the Immigration and Naturalization Service which imposed a fine on owners of commercial fishing vessels for bringing aliens unlawfully into the United States. This court found that the agency's refusal to allow vessel owners to raise duress as a defense to the imposition of a fine was a question of law which was freely reviewable by the court. *Id* at 134.

During the case at bar, this court's blanket holding that substantial evidence in the record supports the Secretary's decision constitutes a deviation from its holding in *Florida Department of Labor,* and *Pollgreen,* supra, regarding several

important issues where the Secretary of USDOL made errors of law in the Final Agency Order.

a. It Was An Error Of Law For The Secretary To Ignore The Job Training Partnership Act And Its Regulations In Contravention Of The Governor's Authority Under The JTPA In The Area Of Procurement.

The law and the regulations regarding the Job Training Partnership Act clearly indicate that Congress intended States to exercise authority regarding procurement and there is no indication of any congressional intent, express or implied, to confer or delegate any authority to USDOL to promulgate substantive rules in the area of procurement. The Congressional intention regarding procurement is found at 20 C.F.R. sec. 629.34, which provides:

> Procurement. Subject to the provisions of section 107 of the Act, recipients and subrecipients shall administer procurement systems that reflect applicable State and local law, rules and regulations as determined by the Governor.

Pursuant to the above regulation, the Governor exercised his authority to establish policy which directed Florida to utilize fixed-unit-priced performance based contracts as the preferable method of contracting in Florida. Such utilization was not prohibited by the law or the regulations. It was not incumbent upon Florida to seek approval from USDOL on whether the contracting method utilized in Florida was appropriate nor was Florida's failure to seek approval violative of the law or regulations. There is no express or implied provisions in the

JTPA law or regulations which requires Florida to relinquish its autonomy over procurement, subject to the whims of the Secretary.

Additionally, it has been judicially recognized that when the 97th Congress designed the JTPA program, it clearly intended to substitute state management for federal management with a recognition of the state role in all local programs. *Hernandez-Colon v. Secretary of Labor,* 835 F.2d 958 (1st Cir. 1988).

b. It Was An Error Of Law For The Secretary And USDOL To Ignore Their Own Regulations.

By allowing USDOL to effectively usurp the authority of the Governor concerning the contracting method adopted by Florida, this court has deviated from a long line of cases in this circuit and other circuits as well, which require administrative agencies to adhere to their own regulations. It is well settled in the law that agencies are required to follow their own regulations. *Chicano Education and Manpower Service v. Department of Labor,* 909 F.2d 1320, 1327 (9th Cir. 1990), citing *Service v. Dulles,* 354 U.S. 363, 77 S. Ct. 1152, 1 L.Ed. 2d 1403 (1957); *Memorial, Inc. v. Harris,* 655 F. 2d 905, 910-11 n. 14 (9th Cir. 1980). Congress recognizes that it can only legislate, not administer, so it necessarily relies on agency action to make "common sense" responses to problems that arise during implementation, so long as those responses are not inconsistent with Congressional intent. *Cablevision System v. Motion Picture Assoc.,* 836 F.2d 599 (C.D. Cir. 1988). Even if the action of an agency is discretionary by statute, an agency's own regulations must be complied with by the agency. *California Human Development Corp. v. Brock,* 762 F.2d 1044, 1049 (D.C. Cir. 1985).

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This Court has allowed USDOL to ignore its regulations in several instances to the detriment of Florida. First of all, USDOL's contravention of the authority of the Governor is in direct conflict with the JTPA regulations at 20 C.F.R. sec. 627.1, which provide in part:

> To establish a continuing relationship under the Act, the Governor and the Secretary shall sign a Governor/Secretary Agreement . . . The agreement shall specify that guidelines, interpretations, and definitions adopted by the Governor shall, to the extent that they are consistent with the Act and applicable rules and regulations, be accepted by the Secretary.

Here, the Congressional intent underlying the JTPA, to respect and defer to the autonomy of States, is abundantly clear. Pursuant to the above provision, the Governor of Florida and the Secretary of USDOL signed an Agreement at the inception of the JTPA in 1983 whereby the Secretary of USDOL agreed to defer to the Governor's guidelines, interpretations and definitions, if such were not inconsistent with the applicable rules and regulations. (USX-1 pg. 88). The record clearly established that USDOL did not articulate or promulgate any rules or regulations during the period covered by the audit which prohibited use of the contracting methods followed by Florida.

Secondly, this Court has allowed USDOL to violate its own regulations regarding record retention, by holding Florida accountable for contracts that had been properly destroyed pursuant to federal provisions, even before USDOL conducted its audit of Florida's Revenue Account. The retention period found in USDOL's own regulations at 20 C.F.R. sec. 629.35 (e) provides:

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> The Governor shall insure that procedures are developed for retention of all records pertinent to all grants and agreements, including financial, statistical, property and participant records and supporting documentation, *for a period of three years* from the date of obligation of funds. . . . (emphasis added).

As contracts for program years 1983 through 1985 had been destroyed prior to the audit and prior to the time of the trial, it was impossible for Florida to produce said contracts and been prejudiced by the Court's sanctioning of USDOL's audit of the Florida's Revenue Account, which audit covered a seven year period, in disregard of USDOL's own regulations regarding records retention, which required a three year retention period for records.

c. It Was An Error Of Law For The Secretary To Disallow Costs Regarding Wagner Peyser Contracts Based On An Alleged Violation of 20 C.F.R. sec. 629.38 (e) (2).

USDOL conceded at the trial that the Wagner Peyser contracts in question were not required to adhere to the requirements of 20 C.F.R. sec. 629.38 (e)(2) because such contracts properly involved direct placements without the necessity of training. (TR-p. 191). The disallowance involved $35,230 of disallowance under the Wagner Peyser Act. Yet, the Secretary's order set forth a blanket disallowance without any deference to the distinction in law between contracts funded pursuant to the JTPA and those funded pursuant to Wagner Peysers, sec. (7) (b).

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d. It Was An Error Of Law For The Secretary To Disallow Costs Associated With The JTPA Contracts Based On An Alleged Violation Of 20 C.F.R. sec. 629.38 (e)(2).

The Secretary's decision found that the contracts violated 20 C.F.R. sec. 629.38 (e) (2) because they contained fixed unit price and cost reimbursement elements and provisions for placement without training. The finding is factually and legally erroneous.

There is nothing in the law or regulations which prescribes the presence of cost reimbursement elements in fixed unit price contracts. The Secretary failed to identify any law or regulation which prohibit provisions in fixed unit price contracts for reimbursing employers for costs associated with providing training and support services to JTPA participants. Indeed, USDOL has recognized and not condemned the presence of such terms in fixed unit price contracts. Particularly, in Training and Employment Guidance Letter No. 3-87, dated November 18, 1987, concerns about contracting practices, pursuant to 20 C.F.R. sec. 629.38 (e) (2) were addressed (AAPX - pgs. 14-28). USDOL instructed that cost reimbursement items in fixed unit price contracts must be clearly set forth. On this issue USDOL specifically cautioned:

> "If the contract contains cost-reimbursable areas (e.g., participant services on an as needed basis, like transportation and child care) as well as fixed unit price areas, are the reimbursement requirements and the performance-based payment requirements clearly delineated"? (AAPX - pg. 24).

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The cost reimbursable elements in the contracts produced, were clearly delineated according to USDOL's instructions and never constituted the full unit price. One contract produced by Florida contained provisions for direct placement of participants without training; however, the contract clearly set forth that such placements were at no cost to the JTPA program.

Further, the Secretary's opinion that Florida failed to follow sound business practices and that the contracts were not negotiated at arms length is not supported by any facts in the record, and furthermore, such opinion does not rise to the level of a legal violation. There is no factual basis in the record, as admitted by USDOL's own witnesses at the hearing, to support a claim of conflict of interest or less than arms length transactions in Florida's contracting process. (TR - pgs 229-230). The requirements the Secretary placed upon Florida's contracting methods constitutes incipient policies and errors of law.